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# **THE LAW QUARTERLY REVIEW**

**VOLUME 1**

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**The Law Book Co. of Australasia Pty Ltd.  
Sydney : Melbourne : Brisbane**

**CANADA**

**The Carswell Company Ltd.  
Toronto**

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THE  
LAW QUARTERLY  
REVIEW.

EDITED BY

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VOL. I.

LONDON  
STEVENS & SONS LIMITED  
1885.



***Published by  
Stevens & Sons Limited  
of 11 New Fetter Lane,  
in the City of London  
and reproduced in Canada by  
The Carswell Printing Company  
Toronto***

***Printed in Canada***

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## SECTION SEVENTEEN OF THE STATUTE OF FRAUDS.

(The introductory part of this article is by MR. JUSTICE STEPHEN, the Digest by MR. JUSTICE STEPHEN and MR. FREDERICK POLLOCK jointly.)

**O**NE of the many difficulties which stand in the way of improving the law of England—perhaps I might say the great difficulty—may be thus expressed. Those who have acquainted themselves with its provisions have generally neither the time nor the inclination to undertake any other task than that of administering it as an existing system. Besides, when a man has mastered an intricate and difficult system, he takes a positive pleasure not only in the superiority which his knowledge gives him, but in that knowledge itself. The late Lord Wensleydale, whilst pitying the hard lot of a man who was ruined because his pleader had supposed his remedy to be trespass instead of case, added: ‘No doubt it is hard on him. The declaration ought to have been in case. If it had been, he would have won; but if the distinction between trespass and case is removed, law, as a science, is gone—gone.’ On the other hand, those who have not a professional acquaintance with law are almost certain to be baffled in any attempt which they may make to improve it by their ignorance of the subject. It has real and great difficulties, and to attempt to deal with the subject without careful previous study and a considerable amount of collateral knowledge is only to run the risk of making bad worse.

Being strongly impressed with these views, and preferring a systematic attempt to improve the law to any other form of public life open to me, I have for some years past employed such leisure as I could command in writing expositions of existing branches of law at once technically correct and complete, and capable of being understood by any person of decent education, sufficiently interested in the subject to read books of moderate length about it requiring close attention. It seemed to me that if the law as it actually is were, so to speak, translated into common English, and made

accessible to the public at large, the materials for its re-enactment in an improved and simplified form—in other words, for its codification—would be provided, and I felt sure that the convenience of that process would be so generally recognised that if it were once begun there would be every reason to hope that it might proceed quite as rapidly as would be desirable.

The existing law of England upon the subjects which I have at different times treated in this manner<sup>1</sup> appears to me to be in the main thoroughly rational, and worthy of being thrown into a more satisfactory form, in order that its substance may be retained. The same remark might, I think, be made on many other parts of our law, and more particularly on those great branches of it which fall under the heads of the Law of Contracts and the Law of Wrongs. The law of contracts, in particular, is in most of its departments admirably rational and equitable, though it exists in a form in which no one can understand it without the labour of years, which bears upon it in every direction traces of the gradual expansion of view and extension of old formulas to meet new facts which are so interesting to the historical student, and so troublesome, not only to the legal practitioner, but also to his clients. I believe that it would be quite as possible to codify the law relating to contracts as to codify the criminal law, and I think that the advantages of such a code would be felt by every man of business in the country. In order to do so, however, it would be necessary in the first place to digest the existing law into one compact body, and it would be a great convenience, in carrying out such an undertaking, if certain parts of the law which are at once most intricate and open to all sorts of objections could be repealed.

Of these branches the most luxuriant, and, to my mind, by much the most objectionable is the 17th section of the Statute of Frauds, as explained by a vast number of cases which have been decided upon in the course of the 201 years during which it has been in force. I know of hardly any part of the whole law of England which throws so much light upon the nature and extent of its defects, or upon the difficulty of understanding and applying a remedy to them (though in this case the remedy appears to me simple enough) as this particular bit of it. The enacting part of the section in question contains 86 words. In Langdell's *Cases on Sales of Personal Property* are printed no less than 178 cases decided upon its meaning. They fill 619 very large and closely printed octavo pages, and the great majority of them were decided by English, though some were decided by American Courts. Mr. Benjamin's exposition of the law upon the subject in his admirable

<sup>1</sup> Criminal Law, the Law of Evidence, and the Law of Copyright.

work on the Contract of Sale fills 120 pages, and after using every possible effort to compress the result of the cases into the shortest possible compass, Mr. Pollock and I have found it necessary to expand the 86 words into 14 articles or propositions, to which we ought perhaps to have added one or two more in order to make our work quite complete<sup>1</sup>. This formidable body of law applies to every one of probably many thousand contracts made every day of the year in England, Ireland, and the greater part of America, the incalculable majority of which are made in absolute ignorance of its provisions, and with no reference whatever to them. In the great mass of cases the contracting party is as unconscious of the existence of the Statute of Frauds as of the pressure of the atmosphere; but now and then a difficulty arises, an action is brought, all appears to go quite satisfactorily, and the party who is seeking to enforce his contract delights in his approaching triumph. Suddenly the Statute of Frauds appears like the physician with his rod at Sancho Panza's dinner. 'Does your lordship think,' asks the defendant's counsel, 'that the Statute of Frauds is satisfied in this case?' The judge doubts, the counsel wrangle, the clients go from court to court in a state of utter bewilderment, and at last, after perhaps months or years of expectation, hear a judgment beginning with some such words as these:—

'I regret to say that the view which I take of the law in this case compels me to come to the conclusion that the defendant is entitled to our judgment, although the merits are entirely against him; although, believing that he had broken his contract, he could only have defended his action in the hope of mitigating the damages; and although he was not aware of the objection on which he now relies till a few days before the trial<sup>2</sup>.'

The special peculiarity of the 17th section of the Statute of Frauds is that it is in the nature of things impossible that it ever should have any operation, except that of enabling a man to escape from the discussion of the question whether he has or has not been guilty of a deliberate fraud by breaking his word. In some cases, no doubt, this may protect an honest man against perjury. In others it may enable a man to give judgment in his own favour, that a contract into which he entered, it may be improvidently, is

<sup>1</sup> We have not thought it necessary to enter into certain questions as to a possible microscopic difference between 'bargain' in s. 17 and 'agreement' in s. 4. Nor have we considered it necessary to the exposition of s. 17 to go into the question whether a contract under the statute can be put an end to by word of mouth.

<sup>2</sup> This is the beginning of Lord Campbell's judgment in *Sievwright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529. The objection in this case was that a broker called some iron 'Dunlop, Wilson & Co.'s pig-iron' in the sold note, whereas in the bought note he called it 'Scotch pig-iron.' All Dunlop's iron was Scotch, but the converse was not true.



inequitable and ought not to be carried out, but in the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality. The cases in which a man of honour would condescend to avail himself of it must, I should think, be very rare indeed. Indeed, I can think of no such case, except indeed the case of deliberate perjury. An illustration or two will show my meaning. A had some negotiations with B about the purchase of a house. B tried to make A specifically perform an agreement which, as alleged (I have no doubt with perfect truth), he had never made. A was able to silence B by saying that at all events there was no agreement within the Statute of Frauds, and so far the statute had its proper and intended effect. At the same time, A was judge in his own cause. If he had been a dishonest man, and had made the agreement suggested, the statute would have enabled him to break it. Take another case. A wanted to take a furnished house, expecting to have to pass the summer in London. He made a verbal agreement to take the house of B, a friend and a man in his own position in life, who was going out of town. The day after that agreement was made, A was ordered to return to his appointment in India instantly. A, being thus prevented from occupying the house, asked B to release him from his agreement, which I think most men in B's position would have done, as nothing had been done under it, and B had been put to no expense or inconvenience. B, however, refused. A reminded B of the Statute of Frauds, but added that, having given his word, he would, if required, fulfil his agreement, whatever he might think of B's conduct. In this case I think A did his duty as a man of honour, but the Statute of Frauds distinctly tempted him to resent a piece of unhandsome conduct by breaking his word. But let us examine the provision more closely. How far the provisions of the Statute of Frauds are commonly known to men of business I do not know. I should suppose that the common impression about them would be to the effect that a contract for the sale of goods of the value of 10*l.* or upwards must, in order to be valid, be in writing. The digest given in the latter part of this article will show how very imperfect, and in some respects how fallacious, an impression this is. I would ask any man of business who may happen to read this article whether he had before he read it any sort of notion of the intricate series of minute, artificial, strangely qualified conditions which Parliament and the judges between them have imposed upon the validity of the contracts in making and executing which his life is passed. Did it ever occur to any ordinary merchant, for instance, that he might, if he was so minded, make by word of mouth a binding

contract for the sale of railway shares worth 100,000*l.*, but that such a contract for a set of false teeth worth 10*l.* 10*s.* would not 'be allowed to be good'? Do railway contractors in general understand that a contract to build a railway may be made by word of mouth (unless it is to extend over more than a year), whatever amount it involves; but that a contract to make for a company any article costing more than 10*l.* falls within the Statute of Frauds? Can any human being assign any reason whatever why a contract of marine insurance should be allowed to be less formal than a contract for the sale of goods? Can any one imagine any intelligible reason why the sale of a crop of potatoes should be subject to different rules from the sale of a crop of clover, and why 'questions not yet finally settled' should present themselves on each of these mysterious subjects to so eminent a lawyer as Mr. Benjamin? Lastly, can any one look at what has been written upon the subject without feeling some indignation at the waste of time, labour, and money, which has been incurred in solving a problem which may be thus stated? 'If the authors of the Statute of Frauds had ever considered the foolish question now before the Court (which it is morally certain they never did), what view are we to guess that they would have taken upon it, our guess being guided by certain artificial rules of construction, the application of which probably vitiates the result arrived at—which result, however, is not of the least importance?' If the great mass of the cases upon the section had been decided the opposite way, I do not think it would have made much difference, except to the individual litigants. If none of them had ever been reported, but each case had been decided simply by direct reference to the words of the statute, and had then been forgotten, I believe that a vast deal of trouble would have been saved, and that nothing worth keeping would have been lost.

I speak, perhaps, with excusable warmth upon this subject, because I have devoted a great deal of time which might have been better employed to this piece of morbid anatomy. And now (to change the metaphor), having cooked my dish with all possible care, I can only recommend that it should be thrown out of the window—that the 17th section should be repealed, and the cases upon it be consigned to oblivion.

Other considerations, besides the obvious ones already suggested, point to this conclusion; and some of them it may be desirable to dwell upon shortly. The 17th section of the Statute of Frauds sins against several of what ought to be the well-recognised rules of all rational legislation.

In the first place it establishes a highly artificial rule about a very simple matter.

In the second place it is a relic of times when the best evidence on such subjects was excluded on a principle now exploded.

In the third place it is, as the multitude of cases decided upon it clearly show, obscure in reference to the subject to which it relates.

One cardinal rule, which those who legislate on the common business of life ought always to bear in mind, is that the power of law to control conduct is small, and is constantly exaggerated. Laws ought to be adjusted to the habits of society, and not to aim at remoulding them. The cases in which any law is actually enforced are infinitesimally small in number in comparison with those in which it has no effect whatever. Custom, and what is called common sense, regulate the great mass of human transactions. If, unfortunately, the law deviates from these guiding principles, it becomes a nuisance. If you require people to take precautions which they feel to be practically unnecessary, and which are alien to their habits of life, the only practical result is that they will prefer the risk of the penalties of neglect to the nuisance of taking the precaution. If the precaution is attended with any, even the smallest degree of intricacy, the force of this remark is increased. The mass of mankind never do, and never will, understand or enter upon legal refinements. It is only when a legal precaution is in accordance with common practice that the law imposing it is beneficial and influential.

The Statute of Frauds affords the clearest possible illustrations of each of these remarks. Such of its provisions as require all transactions relating to land (except short leases) and all wills (with an unimportant exception as to the wills of soldiers and sailors on service) to be in writing have been exceedingly useful, and are probably seldom if ever violated. It is quite possible that every line of them may have been (as has been said) 'worth a subsidy.' The reason is obvious. Such transactions require time and consideration. They are of great importance, of rare occurrence in the life of most persons, and are usually designed to carry into effect arrangements intended to last for a length of time, and of which it may probably become necessary to have a written record long after the parties to them are dead.

With the sale of goods the matter is entirely different. To buy and sell is the daily and hourly business of a large part of the population; and it is perfectly certain that they will make their contracts in the manner which they find to be convenient, and not in the manner which lawyers prescribe for them. The constant decisions upon the 17th section of the statute show what I suppose no one can doubt is the case, namely, that immense numbers of the class of contracts to which that enactment applies are made with

no reference at all to its provisions. To make all such contracts voidable at the option of the party who wishes to escape from them appears to me to be a direct encouragement to fraud.

If we look at the provisions of the statute from a more strictly legal point of view, the result is the same. The 17th section contains a rule of evidence. But the object of all rules of evidence ought to be the discovery of the truth, and accordingly, since the days of Bentham, every artificial rule of evidence, every rule which professes to aid the discovery of truth by excluding the use of means by which the truth can be ascertained, has been viewed with just suspicion. If one wishes to know what were the terms of a verbal contract, the best possible evidence would be that of the persons who made it, or of the bystanders who heard what was said. No, says the statute; in order to avoid fraud, such evidence shall be of no avail unless it is confirmed by a particular kind of written memorandum. Is it possible to defend such a rule? No doubt it seemed reasonable and natural at a time when the evidence of the parties was excluded in all cases; but it seems to me to have become altogether antiquated, and contradictory to the rest of the system to which it belongs, now that the evidence of the parties is admitted in all civil proceedings whatever. As the law stands such a case as this is quite possible. A swears that he sold B a horse for 50*l.*; two witnesses swear that they heard the bargain made. B himself, being called as a witness, admits that he did make the bargain. B would still be able to claim a verdict on the ground of the absence of a note in writing signed by himself or his agent. Is not this a *reductio ad absurdum* of the rule?

Apart from the other defects of the statute, it is obscure in reference to the subject-matter to which it relates, as is proved by the enormous number of decisions which have been necessary to ascertain its meaning. The digest which concludes this article is one long illustration of this; but a closer consideration of the subject throws light upon some of the radical defects of English law. In one sense the 17th section is not obscure at all. Probably it would not occur to any one, lawyer or layman, who read the section for the first time, that it contained any difficulty. The words are all common and plain enough, and the grammatical structure is simple, though in one place it is no doubt elliptical. Where then is the obscurity? It lies mainly in the use of four very common expressions: 'contract for the sale of goods,' 'goods,' 'note or memorandum in writing of the bargain,' 'signed.' To say that the expression, 'contract for the sale of goods,' is obscure, may appear singular, but the assertion is unquestionably true. The long series of cases summed up in the first article of our digest prove it.

The same remark applies to all these phrases. They are obscure because English law is pre-eminently deficient in clear and authoritative definitions of its fundamental terms. Article 1 of our digest shows that, till the year 1861, no satisfactory line had been drawn by English lawyers between the contract for the sale of goods and the contract for work and labour—a subject which had engaged the attention of the Roman jurists in the days of the Antonines<sup>1</sup>. I do not say that their solution of it was satisfactory.

The definition of 'goods' given in Article 3 shows that no precise meaning has ever been attached to this, which is one of the fundamental terms of all law. The first and second chapters of the first title of the second book of the Code Napoléon (articles 516–536) contain a series of most precise and comprehensive definitions on this subject. Some of them would probably be unsuitable to England, but they give to the body of the code great system and completeness. The articles of our digest which sum up the decisions on the 'note or memorandum, in writing, of the bargain,' show (as, indeed, does the form of the section itself) that the authors of it had no very clear conception of the essential parts of a contract. There is no reason to suppose that they clearly distinguished in their own minds the three words 'contract,' 'agreement,' and 'bargain,' all of which occur in section 4 or 17. Their language hovers undecidedly between two meanings, either of which is quite distinct, namely: 'No one shall sue upon any contract for the sale of goods, &c., unless the whole contract was reduced to writing at the time when it was made, and signed by the party sued,' and 'No one shall recover upon any verbal contract for the sale of goods, &c., unless the oral evidence of its having been made is corroborated by some document showing what the party sued promised to do or not to do, and signed,' &c. The language actually employed says neither of these things, but has been interpreted to mean something like the second. The hesitation apparent in the minds of the authors appears to me to have been due to the want of a perfectly distinct conception of a contract, and of the difference between a written contract and written evidence of a verbal contract. I do not know that even in our own days any authoritative doctrines on these subjects can be said to exist.

As for the cases on the meaning of the word 'sign,' I think they are due not so much to any obscurity in the word as to the desire of the Courts to catch at means of preventing the statute from doing more injustice than necessary.

I now pass to the statute itself, and to the digest in which its meaning is given in detail.

<sup>1</sup> See *Digest*, lib. xix. tit. 2, 'Locati Conducti.'

THE 17TH SECTION<sup>1</sup> OF THE STATUTE OF FRAUDS.

29 Ch. II. c. iii. s. 17. (A.D. 1676.)

And be it further enacted: That no contract for the sale of any goods, wares, and merchandises for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised.

THE 17TH SECTION OF THE STATUTE OF FRAUDS  
REDRAWN,

SO AS TO SHOW THE EFFECT OF THE DECISIONS UPON IT  
FROM 1676 TO 1878.

ARTICLE 1.

*Contract for Sale of Goods defined.*

The word 'goods' is hereinafter used in the sense stated in Article 3.

A sale of goods is the transfer of the property in goods for a price in money by the vendor to the purchaser<sup>2</sup>.

A contract for the sale of goods is a contract by which the vendor promises to transfer to the purchaser, and by which the purchaser promises to accept from the vendor, a transfer of property in goods, whether the goods are delivered at the time of the contract or are intended to be delivered at some future time, and whether the goods are, at the time of the contract, actually made, procured, or provided, or fit or ready for delivery or not, and whether or not any act is requisite for making or delivering or rendering them fit for delivery<sup>3</sup>.

[Submitted.] A contract by which one person promises to make goods for another, and by which the other promises to pay a price for such goods when they are made, is a contract for the sale of goods<sup>4</sup>.

<sup>1</sup> 16th in the Statutes of the Realm and Revised Statutes.

<sup>2</sup> See Benj. 1.

<sup>3</sup> *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252, reviewing earlier cases; and see Benj. 99-103, 3rd ed. The latter part of the paragraph is the equivalent of 9 Geo. IV. c. xiv. s. 7, with slight verbal alterations to adapt it to the structure of the sentence. The statute of Geo. IV. does not say that the Statute of Frauds is to extend to a case in which the property in the goods is intended to pass at a time subsequent to the contract, but antecedent to the delivery. 'I contract with you to-day that my horse shall become your property to-morrow, that he shall be delivered to you next week, and paid for next month.' Such a contract, I suppose, would be a very unusual one.

<sup>4</sup> This is somewhat different from the principle stated by Mr. Benjamin in his remarks

A contract by which one person promises to make something which when made will not be his absolute property, and by which the other person promises to pay for the work done, is a contract for work, although the payment may be called a price for the thing, and although the materials of which the thing is made may be supplied by the maker.

#### Illustrations.

1. A promises to make a set of false teeth for B, and B promises to pay for them when made. This is a contract for the sale of goods<sup>1</sup>.
2. A promises to paint a picture of great value for B, A finding the paint and canvas, which are of small value, and B promising to pay for the whole as a work of art. This is a contract for the sale of goods<sup>2</sup>.
3. A employs B to print 500 copies of a book, written by B, at 4l. 10s. a sheet. This is a contract for work, and not for the sale of goods, though B finds the materials<sup>3</sup>.
4. A employs B, a solicitor, to draw a deed on parchment and with ink supplied by B. This is a contract for work, and not for the sale of goods<sup>4</sup>.
5. A contracts with B that B shall carve a block of marble belonging to A into a statue, A paying a large sum of money as the price of the statue. This is a contract for work, although the word 'price' may be used in it<sup>5</sup>.

#### ARTICLE 2.

##### *Contracts for Sale of Goods of value of 10l. to be in a certain Form.*

No agreement for the sale of goods of the value<sup>6</sup> of 10l. or upwards is a contract enforceable by law, unless one or other of the

on *Lee v. Griffin*. The difference lies in the last paragraph of the article. Mr. Benjamin seems to me to explain very clearly one part of the rule, namely, that part which states that a contract is for the sale of goods if the object is to produce a chattel which is to be transferred for a price from the maker to the person who orders it. But this does not quite explain such a case as *Clay v. Yates*, or the case of the solicitor and the deed. The true principle of these cases appears to me to be that neither the book when printed, nor the deed when drawn, is the absolute property of the printer or the solicitor. The author's copyright in the book, and the client's interest in the deed, qualify their proprietary rights. If the printer, being unpaid, were to sell the copies to a publisher, or if the solicitor, not getting his costs, were to threaten to destroy the deed, each could be restrained. A book is more than a bare combination of ink and paper. I should say that the materials used in making it had ceased to exist as such, and that the new product was the property of the employer, subject to the printer's lien and other remedies for the price of his labour.

<sup>1</sup> *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252.

<sup>2</sup> Per Blackburn J. in *Lee v. Griffin*.

<sup>3</sup> *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Exch. 237.

<sup>4</sup> Per Blackburn J. in *Lee v. Griffin*.

<sup>5</sup> Suggested as a consequence of *Lee v. Griffin*.

<sup>6</sup> The effect of 7 Geo. IV. c. xiv. s. 7, is to substitute 'value' for 'price.' *Harman v. Reeve*, 18 C. B. 586, 595; 25 L. J., C. P. 257.

conditions hereinafter specified is observed before the agreement is sued upon.

This article includes—

(a) Single agreements for the purchase of more things than one, each under the value of 10*l.*, but collectively worth 10*l.* or upwards<sup>1</sup>.

(b) Agreements for the sale of goods, and also for other objects, in which the goods sold are worth 10*l.* or upwards<sup>2</sup>.

(c) Agreements for the sale of goods of unascertained value at the time of the sale, which are afterwards ascertained to be worth 10*l.* or upwards<sup>3</sup>.

#### Illustrations.

1. A buys several articles at the shop of B, a linendraper, the price of each being separately agreed upon, and desires an account of the sale to be made out. No one article is of the value of 10*l.*; the total value is 70*l.*<sup>4</sup>

2. A agrees to sell a horse to B, and keep it at his own expense for six weeks, after which B is to fetch it away and pay A 30*l.* The agreement for the sale of the horse is within the statute<sup>5</sup>.

#### ARTICLE 3.

##### *Goods defined.*

The word 'goods' in Article 1 includes every kind of tangible moveable personal property, whether such property was originally fixed or growing out of the soil or not<sup>6</sup>.

It does not include shares<sup>7</sup>, stocks<sup>8</sup>, documents of title, or rights of action.

It does not include things fixed upon or built upon the land<sup>9</sup>.

It does not include the natural growth of land, such as growing timber, fruit, or trees, and the like, growing in the land, and not severed from it<sup>10</sup>, and from the further growth of which in the soil the purchaser is to derive some benefit<sup>11</sup>; but it does include standing timber, which is to be severed immediately either by the seller or the buyer<sup>12</sup>.

It [probably] includes crops annually produced by human labour,

<sup>1</sup> Illustration 1.

<sup>2</sup> Illustration 2.

<sup>3</sup> Involved in *Watts v. Friend*, 10 B. & C. 446.

<sup>4</sup> *Baldey v. Parker*, 2 B. & C. 37.

<sup>5</sup> *Harman v. Reere*, 18 C. B. 586; 25 L. J., C. P. 257.

<sup>6</sup> Benj. 107, quoting Black. 9-10.

<sup>7</sup> *Duncroft v. Albrecht*, 12 Sim. 189 (Railway Shares); *Humble v. Mitchell*, 11 A. & E. 205 (Joint-Stock Bank Shares).

<sup>8</sup> *Heseltine v. Siggers*, 1 Ex. 856; 18 L. J., Exch. 166.

<sup>9</sup> *Lee v. Gaskell*, 1 Q. B. D. 700; Black. 20.

<sup>10</sup> Benj. 109. Such crops are sometimes called 'fructus naturales.' These, however, are included under s. 4 of the statute which relates to the sale of real property.

<sup>11</sup> *Marshall v. Green*, 1 C. P. D. 35; 1 Wms. Saunders, 395.

<sup>12</sup> See *Marshall v. Green*.



such as corn and potatoes, or crops which require annual labour in order to make them grow from old roots, such as hops, growing in the land but not severed from it<sup>1</sup>.

It [probably] does not include crops produced by human labour which require a longer period than a year to come to maturity<sup>2</sup>, or which produce more crops than one when they have come to maturity, such as madder, clover, and teasels, growing in the land and not severed from it<sup>3</sup>.

#### ARTICLE 4.

##### *Acceptance and Actual Receipt.*

An agreement for the sale of goods of the value of 10*l.* or upwards is a contract enforceable by law, if the buyer—

- (a) actually receives; and
- (b) accepts part of the goods sold<sup>4</sup>.

#### ARTICLE 5.

##### *What constitutes Actual Receipt.*

A buyer is said actually to receive goods from the seller—

(a) When the seller or his agent actually delivers the goods to the buyer or his agent, or authorises the buyer or his agent to assume the control of the goods, wherever they may be<sup>5</sup>.

(b) When the seller continues to hold the goods after the sale, agreeing with the buyer to hold them as a bailment from the buyer<sup>6</sup>.

(c) When, the goods being at the time of the sale in the possession of any person as agent or bailee for the seller, it is agreed between the buyer and the seller and such agent or bailee that such agent or bailee shall from the time of the agreement hold the goods for the buyer and not for the seller<sup>7</sup>.

(d) If at the time of the sale the buyer himself holds the goods as agent or bailee for the seller, an agreement that the buyer shall from the time of such agreement hold the goods as owner may be

<sup>1</sup> *Graves v. Weld*, 5 B. & Ad. 105, 119; but see *Waddington v. Bristow*, 2 B. & P. 452, which, however, is virtually overruled. See Benj. 102; see also *Erans v. Roberts*, 5 B. & C. 829, and *Marshall v. Green*. Such crops are sometimes called 'fructus industriales.'

<sup>2</sup> Co. Litt. 55 a, adopted in *Graves v. Weld* (sup.). Such crops would, however, come under the 4th section, if they do not come under the 17th.

<sup>3</sup> *Graves v. Weld*, 5 B. & Ad. 105, 119; Benj. 118. The case does not quite support the proposition in the text.

<sup>4</sup> These are very nearly the words of the Statute of Frauds.

<sup>5</sup> Benj. 154-5.

<sup>6</sup> Illustrations 1-4.

<sup>7</sup> Illustrations 5, 6.

inferred as a fact from any dealings by the buyer with the goods inconsistent with the continuance of his relation of agent or bailee to the seller<sup>1</sup>.

In each of the cases aforesaid. the question whether there has been an actual receipt of the goods by the buyer is a question of fact. The question whether facts have been proved from which such a receipt may be inferred is a question of law<sup>2</sup>.

If the buyer directs the seller to send the goods to the buyer by any common carrier or other person, such carrier or other person is deemed to be the agent of the buyer for the receipt of the goods.

A wrongful refusal to accept goods lawfully tendered to the buyer has not the same effect as an actual receipt of the goods.

#### Illustrations.

1. B, a livery stable keeper, offers to sell a horse in his stable to A. A says: 'The horse is mine; but, as I have no stable, you must keep him at livery for me.' B. is bailee for A, and this is a receipt and acceptance by A<sup>3</sup>.

2. B verbally agrees with A to sell A a horse. Immediately after the agreement is complete, B asks A to lend B the horse for a short time. A assents, and leaves the horse in B's custody. This amounts to a receipt and acceptance by A<sup>4</sup>.

3. A agrees to buy a horse from B for forty-five guineas, and to fetch it away on a day named. A comes back about that day, rides the horse, and asks B, as a favour, to keep it for him another week, saying that he will call and pay for it at the end of that time. Here there is no actual receipt or acceptance by A<sup>5</sup>.

4. A verbally orders two puncheons of rum and one of brandy from B, on the terms of six months' credit, the brandy to remain in B's bonded warehouse till wanted by A. B accepts the order, and sends A an invoice specifying particular puncheons as sold to A, stating the price, and adding 'free for six months,' meaning that the goods may remain so long without charge in B's warehouse. After the six months, A asks B if he will take the goods back, or sell them for A. These facts are relevant to show that A has actually received and accepted the brandy by assenting to B's holding it as warehouseman<sup>6</sup>.

5. A buys of B, through a broker, five tons of a specified quality of oil, to be paid for on delivery. B has oil of that quality lying at a wharf, and authorises the wharfinger to transfer the quantity bought by A into A's name. The wharfinger gives B a transfer order. B then sends a clerk to A with the transfer order, and an invoice

<sup>1</sup> Illustration 7.

<sup>2</sup> Benj. 150 sqq.; *Rushel v. Wheeler*, 15 Q. B. 443, n.

<sup>3</sup> *Elmore v. Stone*, 1 Taunt. 458.

<sup>4</sup> *Martin v. Wallis*, 6 F. & B. 726; 25 L. J., Q. B. 369.

<sup>5</sup> *Tempest v. Fitzgerald*, 3 B. & Ald. 680.

<sup>6</sup> *Cattle v. Swarder*, in Ex. Ch. 6 H. & N. 828; 30 L. J., Exch. 310.

and receipt, to be exchanged for a cheque. A takes the transfer order and refuses to give a cheque. B's clerk then goes to the wharfinger and withdraws B's authority, but the wharfinger delivers to A. Here there is no actual receipt by A, because the wharfinger delivered against B's will, and never held for A with the consent of both A and B<sup>1</sup>.

6. B verbally sells to A goods lying at a wharf, and endorses and delivers to A a delivery account for them. A keeps the warrant, but refuses to pay for the goods, and denies that he ordered them. These facts do not amount to a receipt of the goods by A, though they are relevant to show an acceptance under the next following article<sup>2</sup>.

7. A has goods of B's in his custody. It is agreed that A shall sell part of the goods, to satisfy a debt exceeding 10*l.* which B owes A; but before any sale has been made A verbally proposes to keep the goods at a price mentioned, and B assents. This is relevant to show a change in the character of A's custody of the goods amounting to a receipt and acceptance by him as buyer<sup>3</sup>.

#### ARTICLE 6.

##### *Acceptance defined.*

Acceptance of part of the goods sold means an assent by the buyer to a proposal by the seller that certain goods shall be part of the goods sold, whether such assent is or is not subject to a right on the part of the buyer to object to the bulk of the goods as not corresponding to the terms of the agreement<sup>4</sup>.

Acceptance may either precede, or accompany, or follow the actual receipt of the goods, and may be inferred as a fact from any of the circumstances mentioned in the Clauses i, ii, or iii, next following:—

(i) Where goods are marked or set apart for the buyer with his consent before his actual receipt of them, or where he inspects and approves them before his actual receipt of them<sup>5</sup>.

(ii) Where the buyer acts with reference to the goods, or to documents of title representing them, before or after their actual receipt in a manner in which the owner only would be entitled to act in relation to them<sup>6</sup>.

(iii) Where the buyer omits to reject goods actually received by him for an unreasonable time after he has had an opportunity of exercising the option (if he has an option) of rejecting them.

If the buyer directs the seller to send the goods to the buyer by any common carrier or other person, such common carrier or other

<sup>1</sup> *Godts v. Rose*, 17 C. B. 229; 25 L. J., C. P. 61.

<sup>2</sup> *Farina v. Home*, 16 M. & W. 119; 16 L. J., Exch. 73.

<sup>3</sup> *Edas v. Dudfield*, 1 Q. B. 302.

<sup>4</sup> Blackburn, 23.

<sup>5</sup> Illustrations 1, 2.

<sup>6</sup> Illustrations 3-9.

person is not deemed to be the agent of the buyer for the purpose of accepting the goods.

A tender of the goods for acceptance, and a wrongful refusal to accept on the part of the buyer, is not, for the purposes of this article, deemed to be equivalent to acceptance of them.

#### Illustrations.

1. B offers to sell to A 156 firkins of butter lying in B's cellar at Liverpool. A opens and inspects some of them, and verbally agrees with B to buy the whole at the price of 424*l.*, and gives directions for the delivery of them in London at C's warehouse, where they are delivered accordingly. The approval of the butter is an acceptance, and the delivery at C's warehouse a receipt by A<sup>1</sup>.

2. A verbally agrees with B to buy of him twelve bushels of tares at 1*l.* a bushel, to remain on B's land till seed-time. B measures out twelve bushels and sets them aside for A. Here there is no acceptance, as A does not assent to the appropriation by B<sup>2</sup>.

3. A agrees with B to take a stack of hay standing in B's yard at 2*s.* 6*d.* per cwt. Two months afterwards C agrees with A to buy some of it. The re-sale is relevant to show a receipt and acceptance by A<sup>3</sup>.

4. A agrees with B, a coachmaker, to buy of him a certain carriage, and directs certain alterations to be made in it. A sees and approves the alterations when made, and requests that the carriage may be left in B's shop till he is ready to take it away, and that, in the meantime, B will provide a horse and a man to use the carriage a few times, so that on exportation it may be a second-hand carriage. These facts are acts of ownership amounting to an acceptance of the carriage<sup>4</sup>.

5. A verbally agrees to sell B turnip-seed, then growing, to be harvested and thrashed by A, and delivered to B as B shall direct. A having harvested and thrashed the seed sends twenty sacks of it to B. B spreads it out to a greater extent than is actually necessary to examine its condition, and then rejects it on the ground that it is in bad condition. A proves facts tending to show that it was in fact in good condition when despatched. Here it is a question of fact whether B's dealing with the seed was an act of ownership amounting to acceptance<sup>5</sup>.

6. A verbally orders of B three hogsheads of glue of a specified quality. B sends two hogsheads to A, which A unpacks in his own warehouse and puts into bags. A, on examination, says it is

<sup>1</sup> *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261.

<sup>2</sup> *Hure v. Palmer*, 3 B. & Ald. 321.

<sup>3</sup> *Chaplin v. Rogers*, 1 East, 192.

<sup>4</sup> *Beaumont v. Brengeri*, 5 C. B. 301. The action in this case was for a refusal to accept, and the judge directed a verdict for the plaintiff. A new trial was moved for on the ground that there was no evidence of acceptance, and the Court refused it, saying that the evidence was ample. If requested at the trial, the judge would no doubt have left the case to the jury.

<sup>5</sup> *Parker v. Wallis*, 5 E. & B. 21.

inferior to the specified quality, and rejects it. Unpacking glue alters its condition, and prevents it from being repacked. A's act is relevant to the question whether he accepted the glue or not.

7. A agrees verbally with B to buy fifty quarters of wheat, each of a specified weight, and according to a sample then produced by B. The wheat is by A's order delivered to a general carrier, and is by him in due course delivered to A, who has, in the meanwhile, resold the wheat to C by the same sample by which B sold it to A. A, without examining the bulk himself, tenders it to C, who finds the wheat under the specified weight and rejects it. A thereupon gives notice to B that C rejects it as under weight. The delivery to the carrier is a receipt by A, and the re-sale an acceptance by A, although A is still entitled to object that the wheat does not correspond to the contract<sup>1</sup>.

8. B agrees verbally with A to sell to A a quantity of barley for 80*l.* to correspond with a sample. B sends the bulk to a railway station consigned to A's order. A does nothing, and, two days after the wheat reaches the station, becomes bankrupt. B gives notice to the station-master not to deliver the barley to A or to any one except B or his order. Here there is a receipt (it seems), but no acceptance<sup>2</sup>.

9. A orders of B a quantity of stores for a ship of A's, to be delivered at Constantinople. By A's request the bill of lading of the stores is made out in B's name deliverable to C at Constantinople. B pays the freight, receives the bill of lading, and hands it over to A, who then repays B the freight. A keeps the bill of lading for thirteen months, and sends it back to B on hearing that the goods have not been delivered at Constantinople. The jury were justified in finding on these facts that A both received and accepted the stores<sup>3</sup>.

#### ARTICLE 7.

##### *Acceptance of Samples, or of part of Goods, not completely in Existence.*

For the purposes of the acceptance and receipt, samples are taken to be part of the goods sold if they constitute and are delivered as part of the bulk, but not otherwise<sup>4</sup>.

If there is an agreement for the sale of goods, part of which are and part of which are not in existence at the time of the agreement, every part of them is deemed to be part of the goods to which the agreement applies, for the purposes of receipt and acceptance<sup>5</sup>.

<sup>1</sup> *Morton v. Tibbett*, 15 Q. B. 428; 19 L. J., Q. B. 382.

<sup>2</sup> *Smith v. Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145.

<sup>3</sup> *Currie v. Anderson*, 2 E. & E. 592; 29 L. J., Q. B. 87. Compare *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J., Q. B. 401, where there was delivery of a bill of lading to carriers who were agents to receive, but not to accept. The case contains *dicta* to the effect that dealings with documents of title may be equivalent to acceptance.

<sup>4</sup> *Benj.* 128; *Hinde v. Whitehouse*, 7 East, 558; *Gardner v. Grout*, 2 C. B., N. S. 340.

<sup>5</sup> *Scott v. E. C. Railway*, 12 M. & W. 33; 13 L. J., Exch. 14.

## ARTICLE 8.

*Earnest.*

An agreement for the sale of goods of the value of 10*l.* or upwards is a contract enforceable by law, if anything is given by the buyer to the seller by way of earnest<sup>1</sup>.

Earnest is money, or a valuable thing, not forming part of the price of the goods sold, and given by the buyer to the seller, and accepted by the seller, in order to mark the assent of both parties to the agreement.

## ARTICLE 9.

*Part Payment.*

An agreement for the sale of goods of the value of 10*l.* or upwards is a contract enforceable by law, if the buyer gives something to the seller by way of part payment<sup>2</sup>.

If it is one of the terms of an agreement for the sale of goods that the seller shall deduct from the price of the goods anything due from him to the buyer, such deduction is not a part payment of the price; but if, subsequently to the agreement for the sale of the goods, or by an independent agreement made at the same time therewith, the parties agree that any claim of the buyer upon the seller shall be set off against part of the price of the goods, such an agreement is part payment<sup>3</sup>.

## ARTICLE 10.

*Signed Contracts.*

An agreement<sup>4</sup> for the sale of goods of the value of 10*l.* or upwards is a contract enforceable by law if it is in writing, signed by

<sup>1</sup> Substantially the words of the statute. See Benj. 162 for the definition of 'earnest.'

<sup>2</sup> Stat. Frauds.

<sup>3</sup> *Walker v. Nussey*, 16 M. & W. 302; 16 L. J., Exch. 120.

<sup>4</sup> This and the next Article differ widely from the words of the statute, which are: 'No contract, &c., shall be allowed to be good, except . . . that some note or memorandum in writing of the bargain be made and signed by the parties to be charged,' &c. We believe, however, that the articles as drawn by us represent the meaning of the statute as ascertained both by numerous authorities and conclusive arguments. It would be absurd to suppose that the statute meant to say that a contract completely put into writing should be void, but that a verbal contract, of which a note or memorandum was afterwards made, should be good. This, however, is its literal meaning; for it says that no such contract shall be allowed to be good except in certain cases, and it does not specify the case of contracts completely reduced to writing, but only the case of a verbal contract of which some written 'note or memorandum' is made. This elliptical form of expression is one of the causes which have thrown so much confusion over the cases relating to brokers' books and bought and sold notes. The way in which the matter is stated in the two Articles in the text is meant to remove the obscurity. It is pointed out by Erle J. and Patteson J. in *Sievwright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529. See too *Sawnderson v. Jackson*, 2 B. & P. 238. See too the American case of *Coddington v. Goddard*, 1 Langdell's Cases on Sales, 614.

the parties to be charged by such contract, or by their agents thereunto lawfully authorised.

When such a contract has been made, no other evidence of its terms can be given than the writing itself, or secondary evidence of the contents of the writing in the cases in which secondary evidence is admissible<sup>1</sup>.

Subsequent notes or memoranda relating to any such contract are irrelevant and ineffectual, except as evidence that the parties to the original contract rescinded it and made a new one in the terms of such notes or memoranda<sup>2</sup>.

Such a contract may be made by a broker on behalf of the buyer and seller of such goods, if he is duly authorised thereto by each; and if the broker, having made such a contract, enters it in his book and signs it as the agent and by the authority of each party, such entry is such a contract as aforesaid<sup>3</sup>.

Provided that if the broker afterwards sends out, and the parties accept, signed bought and sold notes corresponding with each other, but differing from the contract as entered in the broker's book, such bought and sold notes are facts relevant to show that the parties entered into a new contract in the terms of those notes<sup>4</sup>.

Provided also that a custom that the seller shall have a reasonable time, after the receipt of the sold note, to object to the sufficiency of the buyer, is reasonable<sup>5</sup>.

#### ARTICLE 11.

##### *Note or Memorandum.*

An agreement for the sale of goods of the value of 10*l.* or upwards is a contract enforceable by law (although it was made verbally) if a note or memorandum in writing containing the particulars specified in Article 12 is signed in the manner described in Article 10<sup>6</sup>.

Such note or memorandum may be contained in more documents than one, provided that, if any such document is not signed as hereinafter mentioned, it must be referred to by a document which is so signed in such a manner that the contents of the one are embodied by reference in the other<sup>7</sup>.

<sup>1</sup> This is the general rule of the common law. See Stephen's Digest of the Law of Evidence, art. 90.

<sup>2</sup> *Hawes v. Forster*, 1 Moo. & R. 368, as explained in *Thornton v. Charles*, 9 M. & W. 802, and by *Sievwright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529.

<sup>3</sup> *Sievwright v. Archibald*, 17 Q. B. 115, where all the authorities are examined, and several adverse dicta explained or overruled. Erie J. dissented.

<sup>4</sup> Same authorities as in last note. <sup>5</sup> *Hodgson v. Davies*, 2 Camp. 533.

<sup>6</sup> Statute of Frauds. (As to the parenthesis, see note to last article.)

<sup>7</sup> *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennet*, 3 Taunt. 169; *Jackson v. Lowe*, 1 Bingham, 9; *Hinde v. Whitehouse*, 7 East, 558; and see *Boydell v. Drummond*, 11 East, 142, decided on s. 4.

The word 'document' includes documents consisting, at the time of signing, of several pieces of paper or other material, tied or otherwise fastened together<sup>1</sup>.

The note or memorandum need not pass between the parties, though it may do so; but it may also be—

(i) A communication made by the party to be charged to a stranger to the contract<sup>2</sup>; or

(ii) A written offer made by the party to be charged to the party seeking to charge him, and verbally accepted by the party last mentioned<sup>3</sup>; or

(iii) A communication made by the party to be charged to the party who charges him, in which the party to be charged denies his liability on the contract<sup>4</sup>.

#### Illustrations.

1. A buyer at an auction signs his name in the catalogue opposite the lots bought by him. The sale is subject to conditions which are not contained or mentioned in the catalogue, nor annexed thereto. Here there is no note or memorandum sufficient for the purposes of this article<sup>5</sup>.

2. On January 11 B agrees to sell wool of greater value than 10*l.* to A. A hands to B a written memorandum of the terms of the sale, containing, among other things, the following: 'The whole to be cleared in about twenty-one days.' On February 8 B writes to A: 'It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract.' Next day B orally repeats to A his refusal to deliver the wool. A asks for a copy of the contract, and B writes to A, enclosing a copy of the memorandum written by A: 'I beg to enclose copy of your letter of January 11.' A's two letters, and the memorandum referred to in the second, form together a sufficient note or memorandum for the purposes of this Article<sup>6</sup>.

3. B orally agrees to sell certain chimney-glasses to A, and sends them to him. On their arrival A finds them to be damaged, refuses to receive them, and some time afterwards writes to B: 'The only parcel of goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and

<sup>1</sup> Benj. 160.

<sup>2</sup> Benj. 167; *Gibson v. Holland*, L. R. 1 C. P. 1; 35 L. J., C. P. 5. In this case the communication was to the agent of the parties to be charged.

<sup>3</sup> *Kemp v. Pickles* (Ex. Ch.), 1 Ex. 342 (on s. 4).

<sup>4</sup> Benj. 186.

<sup>5</sup> *Hinde v. Whitehouse*, 7 East, 558. The auctioneer signed in this case, as to which see Article 13. *Peirce v. Corf*, L. R. 9 Q. B. 210.

<sup>6</sup> *Buxton v. Rust*, L. R. 7 Ex. 1. In Ex. Ch. *ib.* 279. N.B. In this case the parties differ as to the construction of the contract, though they agree as to the terms.



have long since declined to have for reasons made known to you at the time.' This is a sufficient note or memorandum of the bargain<sup>1</sup>.

4. A orders of B, by word of mouth, cheeses and candles of more than 10*l.* value. B sends to A the quantity ordered, and an invoice in the usual form. A refuses to take the goods, and sends back the invoice to B, with a signed note written on the back of it: 'The cheeses came to-day, but I did not take them in, for they were very badly crushed; so the candles and cheese are returned.' The invoice, with this note endorsed upon it, is a sufficient note or memorandum<sup>2</sup>.

5. B orally agrees with A to sell him some timber. In answer to a letter from B's solicitor, claiming payment as on an unconditional sale, A writes: 'I have this moment received a letter from you respecting B's timber, which I bought of him at 4*s.* 6*d.* per foot, to be sound and good, which I have some doubts whether it is or not, but he promised to make it so and now denies it.' This is not a sufficient note or memorandum, as it does not admit the agreement under which B claims payment, but sets up a different agreement not admitted by B<sup>3</sup>.

#### ARTICLE 12.

##### *What the Note or Memorandum must contain.*

The note or memorandum referred to in Article 11 must show—

(i) Who are the parties to the agreement, either by naming them, or by giving a description of them by which they can be identified as such; and—

(ii) What was the promise made by the party to be charged; but it is not certain how far the promise made by the party seeking to charge the other need appear.

The price at which the goods were sold must appear if it was agreed upon by the parties, but it need not be stated if it was not specifically agreed upon.

##### *Illustrations.*

1. A writes, signs, and delivers to B a document in the following words: 'I will furnish B with funds for the purchase of a steam engine and machinery for a flour-mill on his suiting himself with the same and notifying the purchase to me.' B gives this document to C, who, on the faith of it, supplies a steam engine to B. The document is not sufficient as a note or memorandum for the purposes of Article 11, inasmuch as it fails to show who were the parties to the agreement<sup>4</sup>.

<sup>1</sup> *Bailey v. Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150.

<sup>2</sup> *Wilkinson v. Evans*, L. R. 1 C. P. 407; 35 L. J., C. P. 224.

<sup>3</sup> *Smith v. Surman*, 9 B. & C. 561.

<sup>4</sup> *Williams v. Byrnes*, 1 Moo. P. C. C. N. S. 154.

2. B having bought goods exceeding 10*l.* in value resells them to A, who signs a document in the following words: 'A agrees to buy the whole of the lots of marble purchased by A, now lying at Lyme Cobb, at 1*s.* per foot.' This is not a sufficient note or memorandum, as it does not show that B is the seller<sup>1</sup>.

It would be sufficient if it appeared, either by the document itself or by external proof, that B was a dealer in marble<sup>2</sup>.

3. A signed memorandum in these words—'We agree to give A 19*l.* per pound for thirty bales of Smyrna cotton'—is, as against the party signing, a sufficient note or memorandum in writing for the purposes of this Article, though it shows no promise on A's part to sell the cotton<sup>3</sup>.

4. A orders goods at B's shop. A list of the goods bought is entered in a book entitled 'Order Book' and having B's name on the fly-leaf. A writes his name and address at the foot of the list. The list signed by A in B's order book is a sufficient note or memorandum as against A, as it shows all that is to be done on A's part, although a slight alteration to be made by B in one of the articles is not mentioned in the list<sup>4</sup>.

5. A delivers to B an order in writing to build a carriage of a specified description by a certain time, saying nothing about price. B makes the carriage, and in the course of the making alters it in various points at A's request. The order is a sufficient note and memorandum, and A must take the carriage at a reasonable price<sup>5</sup>.

### ARTICLE 13.

#### *Of signing the Note or Memorandum.*

Either the name<sup>6</sup> or [perhaps] the initials, if they are intended as a signature, or the mark of the person to be charged<sup>7</sup>, must be written, made, printed, or stamped by him or by his agent duly authorised thereto on the note or memorandum<sup>8</sup>, in such a position as to show that it was the intention of the signer that such signature should refer to every material part of the note or memorandum proceeding from him<sup>9</sup>.

If the signature is not in the usual place, it is a question of fact whether it was or was not intended to have such reference as aforesaid<sup>10</sup>.

<sup>1</sup> *Vandenbergh v. Spooner*, L. R. 1 Ex. 316; 35 L. J., Exch. 201 (doubted by Willes J.); L. R. 3 C. P. p. 54.

<sup>2</sup> *Newell v. Radford*, L. R. 3 C. P. 52; 37 L. J., C. P. 1.

<sup>3</sup> *Egerton v. Matthews*, 6 East, 307.

<sup>4</sup> *Sarl v. Bourdillon*, 1 C. B., N. S. 188; 26 L. J., C. P. 78.

<sup>5</sup> *Hoadley v. MacLaine*, 10 Bing. 482.

<sup>6</sup> Benj. 190.

<sup>7</sup> Benj. 220. *Quære* as to a mark made by a person capable of signing. See *Hubert v. Moreau*, 2 C. & P. 528. Quoted by Benj. *loc. cit.* Also *Baker v. Denning*, 8 Ad. & E. 94, which seems to show that such a mark is a signature if so intended.

<sup>8</sup> Illustrations 2, 3, 4.

<sup>9</sup> *Caton v. Caton*, L. R. 2 H. L. 127, 142; 36 L. J., Chanc. 886.

<sup>10</sup> Per Lord Abinger in *Johnson v. Dodgson*, 2 M. & W. 653.

A signature, actually made before the whole or any part of the note or memorandum, may be adopted by the party signing as his signature intended to have reference to the whole of the note or memorandum in its final condition<sup>1</sup>.

Signature by an agent in his own name, whether with or without any statement or qualification showing that he is an agent, is equivalent, for the purposes of this Article, to a signature of the principal's name<sup>2</sup>.

It is immaterial whether the signature is made for the purpose of acknowledging, affecting, or verifying the agreement, or for any collateral purpose<sup>3</sup>.

#### Illustrations.

1. A orders cotton goods of B. B takes a paper on which is printed, 'Bought of B & Co. cotton yarn and piece goods,' and writes at the head of it A's name, and underneath a list of the goods bought and their prices. This is a sufficient note or memorandum as against B<sup>4</sup>.

2. A calls on B to offer goods for sale. B gives A an order, enters the terms in B's own book, with the heading, 'Sold B,' and gets A to sign it. This is a sufficient note or memorandum as against B, the 'Sold B' being a sufficient signature<sup>5</sup>.

3. C, agent for B, calls on A to offer goods for sale, and A gives an order. C, at A's request, enters the terms in A's book, and signs them with his own name. This is not a sufficient note or memorandum as against A, as there is nothing to show that A made C his agent to write A's name<sup>6</sup>.

4. B is a hop-grower, A a hop-merchant, C a factor. By the custom of the hop trade, the factor acts for the seller only. After negotiation between A and C for the purchase of B's hops, B and A meet in C's counting-house, and agree for a sale of B's hops to A at 16*l.* 16*s.* a cwt. C then and there writes out and delivers to A a memorandum, as follows:—

Messrs. A.	Bought of C.
Bags 33.	B 16 <i>l.</i> 16 <i>s.</i>

The memorandum is dated, and the date is altered at A's request, in order to give him a longer time to pay, according to the custom of the trade. A takes away the memorandum. C retains a counterpart of it headed 'Sold to A.' These facts are relevant to show that C was authorised by B to make a binding record of the

<sup>1</sup> Illustrations 1 and 5.

<sup>2</sup> Benj. 198.

<sup>3</sup> Illustration 6.

<sup>4</sup> *Schneider v. Norris*, 2 M. & S. 286; and see *Saunderson v. Jackson*, 2 B. & P. 238.

<sup>5</sup> *Johnson v. Dodgson*, 2 M. & W. 653.

<sup>6</sup> *Graham v. Musson*, 5 Bing. N. C. 603; cf. *Murphy v. Boese*, L. R. 10 Ex. 126.

bargain between A and B; and if he was so authorised, there is a sufficient note or memorandum as against A<sup>1</sup>.

5. B sends to A an unsigned memorandum containing the terms proposed by B for a sale of B's ship. A makes alterations in the memorandum, and then signs it, and returns it to B. B strikes out A's alterations, makes others of his own, signs the document, and takes it back to A. A then orally agrees to B's alterations, and approves of the memorandum as signed by B. A's signature now refers to the memorandum in its final condition, and there is, as against A, a sufficient note or memorandum of the agreement<sup>2</sup>.

6. It is resolved at a meeting of directors of a company that an agreement be entered into in the terms of a draft then submitted to the board. The secretary enters a minute of the resolution in the minute book, and at the next meeting the minutes of the first meeting, including this entry, are signed by the chairman. The minutes so signed are a sufficient note and memorandum of the agreement as against the company<sup>3</sup>.

#### ARTICLE 14.

##### *Bought and Sold Notes.*

If a sale of goods to the value of 10*l.* or upwards is made by a broker, and if the broker does not enter the contract of sale in his book, or enters but does not sign it, and if the broker afterwards sends a bought note to the buyer of the goods, and a sold note to the seller of the goods, the following consequences follow:—

If both notes are sent, and both are signed, and if the two correspond, they constitute a note or memorandum of the bargain within the meaning of the Statute of Frauds<sup>4</sup>.

If a bought note is sent to the buyer, signed by the broker, it is a sufficient note or memorandum to satisfy the Statute of Frauds as against the buyer<sup>5</sup>.

If a sold note is sent to the seller, signed by the broker, and if the buyer authorised the broker to make the contract for him, and to send out bought and sold notes, the note is a sufficient note or memorandum to satisfy the Statute of Frauds as against the buyer<sup>6</sup>.

<sup>1</sup> *Durrell v. Evans* (Ex. Ch.), 1 H. & C. 174; 31 L. J., Exch. 337.

<sup>2</sup> *Stewart v. Eddowes*, L. R. 9 C. P. 311.

<sup>3</sup> *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314 (on s. 4).

<sup>4</sup> *Groom v. Aftalo*, 6 B. & C. 117, as explained in *Sievwright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529.

<sup>5</sup> *Parton v. Crofts*, 16 C. B., N. S. 11; 33 L. J., C. P. 189. *Cowie v. Remfry*, 5 Moo. P. C. C. 232, seems to be opposed to this. The case was strongly disapproved of by Willes J. in *Heyworth v. Knight*, 17 C. B., N. S. 298.

<sup>6</sup> *Thompson v. Gardiner*, 1 C. P. D. 777.

If bought and sold notes are sent out, each signed by the broker, but varying from each other in a material point, and if the original contract was verbal, neither of the notes is a note or memorandum in writing within the meaning of the Statute of Frauds<sup>1</sup>. The burden of proving such a variance lies on the defendant as soon as the plaintiff has produced a bought note or a sold note sufficient as against the defendant, according to the rules hereinbefore stated<sup>2</sup>.

JAMES FITZJAMES STEPHEN.  
FREDERICK POLLOCK.

P.S.—My part of this paper was written some, I think upwards of seven, years ago. I have not revised or indeed seen it since, nor have I brought down the digest to the present day<sup>3</sup>. My judicial experience for the last six years has confirmed the opinions expressed in the paper. I may add that the Statute appears to me to have fallen practically into disuse. I have hardly ever been called upon to decide a case on the 17th Section. I am informed that in some large towns, in Liverpool for instance, mercantile men repudiate it in practice.

J. F. S.

November 25, 1884.

<sup>1</sup> *Sievwright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529, and several earlier cases.

<sup>2</sup> This Article and Article 13 differ in appearance from the eight propositions which Mr. Benjamin submits (255, 3rd ed.) as the result of the cases on the subject, but they will be found, on a careful comparison, to coincide substantially with them.

<sup>3</sup> It was composed in 1877-8, as part of a plan afterwards abandoned. I do not find that any cases of importance on s. 17 have been reported since that time.—F. P.

## THE FRANCHISE BILL.

**T**HE Franchise Bill, in the form in which it is now presented to us, must be taken to represent the latest and most matured conceptions of the House of Commons on the subject of electoral legislation. With the policy of the measure I am not here concerned. My object is to take it as an illustration, and perhaps the most conspicuous and striking illustration which it would be possible to find, of the urgent need of some sort of consolidation of the statute-law of the constitution. It seems a mockery to confer upon a man the right to vote and then tell him that to understand the terms on which he may vote he must import into an Act of 1884 the conditions of a repealed clause of an Act of 1832, and then read the result in connection with and subject to Acts of 1869 and 1878. Yet this is the position of a £10 occupier in a borough and is not an unfair sample of the confusion which the Bill proposes either to create or to leave unremedied.

It is true that its opening contains an agreeable promise of simplicity; it applies to the United Kingdom, and we are cheered by the words 'uniform household and lodger franchise' and 'assimilation of occupation qualification' in the marginal notes to the third and fifth sections. But the hopes thus raised are barely sustained through a perusal of the first five sections, and wholly fail us when we come to the supplemental provisions. By this time the student of our electoral system feels as Lord Mansfield felt with regard to the doctrine of disseisin at election, that 'the more we read, unless we are very careful to distinguish, the more we shall be confounded.'

Looking to England only, the bill creates one new franchise in boroughs, the service qualification; and three new franchises in counties, the household, lodger, and service qualifications: it assimilates in amount, though not in other conditions, the county and borough occupation qualifications: and it retains such of the ancient franchises as were retained by the Act of 1832, and the property qualifications in counties which were created by that Act and reduced in amount by the Act of 1867.

Thus, without reference to the Acts which deal with the representation of Scotland and Ireland, the English voter may be qualified to vote at a borough election in one of six ways, as a householder, lodger, service tenant, occupier, freeholder, or freeman;

or at a county election in one of seven ways, as a householder, lodger, service tenant, occupier, freeholder, copyholder, or leaseholder. The freehold qualification differs in amount according as it is acquired in certain ways or combined with occupation; the leasehold qualification differs in amount according to the length of the term in its inception: the occupation qualification is still to differ in conditions, though not in amount, in boroughs and counties. Nor is this all; the household and occupation qualifications depend upon the qualifying tenement being rated and the rate having been paid in respect of it, and the rules upon this subject were settled in one way by the Representation of the People Act of 1867, and in another way by the Poor Rate Assessment Act of 1869, and the effect of the provisions of the last of these Acts has been extended by the Registration Act of 1878.

If one should try to trace the effect of the Franchise Bill upon the condition of electoral rights, dealing with England only, it would seem the simplest plan to take the franchises in historical order. If we divide them into borough and county qualifications, we find at once that some are common to borough and county, and some are not. The fact that a franchise is limited or general is therefore an incident and not an essential feature of the qualification. It may not be useless at this present epoch in legislation upon the subject to take a survey of electoral rights as formulated by a bill into the details of which it is probable that not one in every hundred of its supporters has been at the trouble to look.

The Reform Act of 1832 preserved, with some important limitations, two of the old franchises: the qualification by reason of being a freeman or burgess of a town where such freedom had given the right to vote; and the freehold qualification in counties, and in towns which were counties corporate.

Before 1832 the right to vote in some towns was possessed by the freemen of the corporation, either exclusively or in conjunction with other classes of voters. Freedom, for this purpose, might be acquired differently in different towns. It might be acquired by birth, marriage with the daughter or widow of a freeman, servitude or apprenticeship, gift, purchase. In some towns residence was necessary, in others it was not. So far as one may venture to say that one class of voter, before 1832, was more corrupt than another, it may be said that corruption flourished with peculiar luxuriance among the freemen of corporate towns. The Reform Bill retained this franchise, subject to severe limitations, in cities and boroughs where it had, up to that time, prevailed. The freeman to entitle him to vote must have acquired his freedom by birth or servitude, and he must have resided for six months before the last day

of July in or within seven miles of the city or borough for which he claims to vote. This franchise it is not proposed to touch.

A form of this franchise, but subject to different rules, exists, and will continue to exist, in the case of the freemen who are also liverymen in the city of London. But let us pass to the other ancient franchise which is still preserved.

By 8 Hen. VI. c. 7 the qualification to vote for a knight of the shire was made to consist in being seised of a freehold worth forty shillings a year, and an Act of 1432 required that the freehold should be situated and the voter resident in the county for which the vote was claimed. This last requirement fell out of use, it was abolished by 14 Geo. III. c. 68, and so we have come to the modern theory, that Property as such, apart from occupation or residence, is entitled to representation. In certain towns which were counties corporate the same qualification gave a right to vote for the city or borough.

The Act of 1832 retained this qualification for counties, and towns which were counties, but confined its effect to freeholds which were (1) of inheritance, (2) acquired by marriage, marriage settlement, devise or promotion to benefice or office, (3) in the occupation of the voter if his estate was for life and not acquired as above described. And thus the forty shilling freehold qualification gave the right to vote if the voter occupied it, or if he had such an estate in it, or had acquired his estate in such a manner as to diminish the likelihood of his having got it for the sole purpose of obtaining a vote.

This ancient property qualification must be distinguished from the property qualification of 1832 which relates only to counties, which can be exercised without any requirement of occupation or of having been acquired in any specified ways.

The Reform Act, 1832, introduced property qualifications of four sorts: freehold of the clear yearly value of £10; copyhold, or land held on any other tenure except freehold, of the same value; leasehold of the same value and for a term originally created for not less than sixty years; and leasehold of £50 clear yearly value and for a term originally created for not less than twenty years. None of these needed to be in the occupation of the voter, except in the event of the vote being claimed by a sub-lessee or assignee of a term of sixty or twenty years.

The Representation of the People Act, 1867, leaves untouched the qualification of the twenty years' lease, but modifies the others and reduces the enactments on the subject to a single clause. A man is qualified to be on the register of voters for a county who is (1) seised at law or in equity of lands or tenements of freehold,



copyhold or any other tenure for his own or other life or lives, or for any larger estate, of the clear yearly value of not less than £5. Or (2) is entitled as lessee or assignee, for any portion of a term originally created for not less than sixty years, to lands or tenements of any tenure of the clear yearly value of not less than £5.

There is then an old property qualification for counties and towns which are counties, created by the Act of Henry VI. and modified by the Act of 1832; a modern property qualification, for counties only, of freehold, copyhold, and leasehold for a term of sixty years, created by the Act of 1832, reduced in amount by the Act of 1867, and relieved as regards leasehold from the need of occupation in the case of sub-lessees or assignees; and a modern property qualification, £50 leasehold of a term of twenty years, created by the Act of 1832, and left untouched by the Act of 1867.

I do not propose to dwell upon the differences which exist in England, Scotland and Ireland in respect of the property qualification. Scotland has its own law and Scotland and Ireland have had their own Reform Acts. But one may note that in Ireland the forty shilling freeholder was disfranchised by 10 Geo. IV. c. 8; that in Scotland he was only qualified to vote if he held of the crown, and that he disappeared in the Reform of 1832.

The Bill of 1884 does not touch these qualifications except in clause 4 as to the creation of fagot votes. Perhaps we are thereby fortunate in being saved from further complexities, for, cumbrous as the existing law may be, the tendency of the Franchise Bill is not towards simplification.

Next we come to the Occupation franchise. This differs from the franchise based on a property qualification in that it implies a user of the land or tenement which confers the right to vote: and it differs from the residential qualification in that the voter need not, in order to qualify himself, actually dwell upon or in the qualifying land or tenement. The difference between an occupier and an inhabitant occupier is important.

The occupation franchise was the creation of the Act of 1832. It included two separate and distinct qualifications, the one applying to county, the other to borough constituencies. The county qualification was acquired by any one who should 'occupy as tenant any lands or tenements for which he shall be *bona fide* liable to a clear yearly rent of £50.' This was the well-known 'Chandos clause' of the Reform Act. It was thought that the influence which land-owners would acquire in county elections, by the pressure which they could bring to bear upon occupiers on a yearly tenancy, might help to compensate them for the loss of the nomination boroughs.

This clause was left untouched by the Act of 1867, but another occupation franchise for counties was created alongside of it by s. 6 of that Act. The qualification of 1832 depended on rental, that of 1867 on rating, and gave a right to vote to any one who had occupied, for twelve months before the end of July in any year, as owner<sup>1</sup> or tenant, lands or tenements in the county of the rateable value of £12, who had been actually rated if any rate was made, and who had paid his rates.

The Bill of 1884 repeals the Chandos clause and s. 6 of the Act of 1867, it assimilates the qualification to that required for the borough occupation franchise, but retains the conditions of the Act of 1867. This qualification then, in counties, depends on the repealed section of the Act of 1867; we must substitute £10 clear yearly value for £12 rateable value, but the requirements as to rating are retained.

The borough *occupation* franchise, as distinct from the qualification of the *inhabitant occupier*, depends upon the Act of 1832. The 27th section of that Act gives a vote to the occupier of any house, warehouse, counting-house, shop, or other building which, either separately or jointly with other land occupied by him in the same city or borough, is of the clear yearly value of £10. The occupier must have been rated in respect of his tenement, must have paid his rates, and must have resided in or within seven miles of the borough, in respect of which he claims to vote, for six months during the year preceding his registration as a voter. By 41 & 42 Vict. c. 26. s. 5, the qualification extends to any *part* of a house separately occupied under the above conditions.

The Bill of 1884 proposes to enact that the occupation franchise in counties and boroughs alike should henceforth be acquired by the occupier of land or tenement of the clear yearly value of £10, so that the borough occupier may now qualify in respect of land with no building upon it. But it further proposes to subject this qualification to the conditions which at present affect the rights of the occupier to vote in boroughs and counties.

Therefore, although s. 27 of the Reform Act and s. 6 of the Representation of the People Act are to be repealed by the Franchise Bill (schedule ii. part 2), their conditions are imported into the new qualification. And so, in order to understand the proposed

<sup>1</sup> The words 'as owner or tenant' in the county occupation franchise created by the Act of 1867 would seem to be a copy, without reference to the meaning of the words, of the clause in the Act of 1832 which creates the occupation franchise in towns. The word 'owner' had a meaning in that clause because there was no property qualification in towns, except in such as were counties corporate. But the occupying owner of lands or tenements in a county of £12 rateable value would certainly obtain his vote under one of the property qualifications, so that the word 'owner' seems to be useless if not misleading.

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... of the present Bill upon his electoral rights, the count  
... must study the 6th section of the Act of 1867, and t  
... borough occupier must study the 17th section of the Act of 18  
... the 5th section of the Act of 1878, and both must read i  
... clauses the provisions as to rating which are contained in  
... 33 Vict. c. 41 and 41 & 42 Vict. c. 26.  
The complications of the law respecting rating may be postp  
... we come to the next group of qualifications, those v  
... depend upon Residence.

The Franchise Bill proposes to extend to counties the hou  
... and lodger qualification which now exists in boroughs,  
... create in both a new qualification—the tenure of a house b  
... service.

But the expression 'a household qualification' means, we  
... respects England and Ireland, 'the qualification enacted  
... section of the Representation of the People Act, 1867  
... amendments amending or affecting the same.' A househo  
... then, is affected by certain Acts to which a  
... allusion is made in section 6, sub-sec. 1 of the  
... Bill. Let us therefore first see what is the qualification 'a

The voter must, for twelve calendar months before the  
... section' of the Act of 1867.

He must, for twelve calendar months before the  
... in the year in which he claims to be registered, have been  
... not occupier or tenant of a dwelling-house in the borou  
... s. 6: 'dwelling-house' is to 'include any part of a ho  
... as a separate dwelling and separately rated in the relief o  
... He must have been rated in respect of his premises  
... not made for his premises during that time.

He must have paid, by the 10th of July, so much  
... rate as had become due up to the preceding 5th of Ja  
... The Act then goes on, in section 7, to provide fo  
... the occupier instead of the owner, and makes the  
... occupier and the payment of poor-rate by him a cond  
... to the right to be registered.

It had always been held that an occupier might  
... owner of premises that the owner should pay the r  
... tion of an increased rent paid by the occupier;  
... under such circumstances entitling to be the r  
... for the purpose of payment of rate, and the ten  
... was not thereby affected. (*Lord v. Lord*, 2  
... discussed vol. 1, p. 358.)

But this principle did not apply to cases in wh  
... rated in the name of the occupier, a position which

in the case of owners of a large number of small tenements, and which had been permissible under the provisions of certain local Acts and of the Small Tenements Act, 13 & 14 Vict. c. 99.

The Representation of the People Act, 1867, required the separate rating of all occupiers. The Poor-rate Assessment and Collection Act, 1869, 32 & 33 Vict. c. 41, on the other hand, provides that the owners may agree in certain cases with the overseers (s. 3), or may be compelled by the vestry (s. 4), to be rated instead of the occupiers, the owner under such circumstances obtaining a deduction from the rate; or he may make his own terms with the tenant (ss. 7, 8). In such cases the owner is to deliver to the overseer a list of the occupiers whose rates are thus paid. And the overseer is bound to enter every occupier of rateable premises. The tenant is not to lose his vote because his landlord has been rated, or has paid the rates on his behalf, nor because the overseer has omitted to enter his name in the rate-book, nor even because he has omitted to claim to be rated.

Lest these provisions of the Act of 1869 should be held to be limited to cases in which the landlord had agreed with the overseers or had been compelled by the vestry to be rated in lieu of his tenant, the Registration Act of 1878, 41 & 42 Vict. c. 26. s. 14, enacts that they should be of general application; and in s. 5 it supersedes the interpretation of a 'dwelling-house' given in the Act of 1867 by one which *does not include separate rating as a necessary part of the qualification.*

Thus the householder who occupies rateable premises is entitled to claim a vote if rate has been paid for his premises, though they may not have been specifically rated, and though the rate has been paid by the owner and not by the occupier. These provisions would seem to apply alike to the £10 occupier and to the inhabitant householder; the first must begin his researches with the Act of 1832, the second with the Act of 1867, but both must study the Acts of 1869 and 1878 in order fully to apprehend the conditions precedent to their right to be placed upon the register of voters.

The Lodger franchise is the creation of the Act of 1867; before that Act a lodger could not be qualified as a voter, though he paid a rent of more than £10 a-year, because he did not occupy a *house* within the meaning of the 27th section of the Reform Act. But the Act of 1867 enfranchises the lodger who has resided in the same lodgings as sole tenant for twelve months preceding the 31st of July in the year in which he claims to be registered, such lodgings being of the clear yearly value, unfurnished, of £10.

The Act of 1878 (41 & 42 Vict. c. 26) has so far altered the qualification

that different lodgings may be occupied in the same house without invalidating the vote, and that two persons may qualify as joint occupiers of the same lodgings if the rent is equivalent to £10 a piece.

The task of distinguishing the household from the lodger qualification has taxed the ingenuity of judges, and the difficulty has been increased by the Act of 1878, which enables a man to qualify as a householder who occupies part of a house not separately rated. The primary distinction is this, that the householder must occupy rateable premises for which rate is paid, no matter by whom; the lodger need not and cannot be rated. But what if the lodger is occupying rateable premises on which rate is paid? What determines the question whether he is a lodger or householder? The answer, so we are told by a high judicial authority, 'must depend on the circumstances of each case<sup>1</sup>.' The occupation of any part of the premises by the owner—the rendering of any service by him to his tenants—the amount of control exercised by him over the portion of the house which is let—all these are circumstances which may contribute to the solution of each problem as it arises.

The service franchise comes last on our list. It is proposed to introduce this qualification into boroughs and counties, and thereby to enfranchise householders, who are neither owners nor tenants, but merely occupiers of a house in consideration of service rendered or office held. Such persons had been previously incapable of acquiring a vote because, though their premises were rateable and rate was paid in respect of them, they did not pay the rate either directly or in the form of increased rent, and they could not claim to be rated in respect of the premises.

The clause which constitutes this franchise makes no allusion to the amount of residence which qualifies the voter. It is only by reference to the debates on the Bill that one discovers that the 11th section, which provides that 'this Act' 'shall be construed as one with the Representation of the People Acts,' is to be understood to import into the service qualification the same requirement as to residence which governs the household and lodger qualification.

It would be idle to anticipate the legal difficulties which may arise in distinguishing householder, lodger, and service tenant. The framers of the Bill appear to have made it their chief object to extend the franchise, and to leave as little opening as possible for discussion on legal points: hence all precise rules on the subject have to be sought painfully and with difficulty in the numerous

<sup>1</sup> Jessel, M. R., in *Bradley v. Baylis*, 8 Q. B. D. 219.

statutes which are more or less incorporated into the terms of the Bill.

If we regard the Bill as a whole, there are two points which specially impress themselves on the minds of those who have read the Bill and the debates which took place last summer upon the enacting clauses of it.

Firstly, it is impossible not to be struck by the anomalies which are left in existence by a law which professes to simplify and assimilate electoral rights throughout the country. The qualifications for the franchise fall under three heads—Property, Occupation, Residence; and residence is the only one of these qualifications which will be uniform in borough and county.

The Property qualification is evidently regarded with disfavour by the framers of the Bill. The provisions which are described in the arrangement of clauses as 'the prohibition of the multiplication of votes,' and more familiarly in the marginal note as 'restriction on fagot votes,' are directed solely at the property qualification in certain forms. No one will henceforth be entitled to a vote in right of that form of freehold qualification known as a rentcharge, whatever may be the value of the rentcharge or the powers of re-entry in default of payment. The only excepted cases are those of owners 'of the whole of a tithe rentcharge of a rectory, vicarage, chapelry or benefice to which an apportionment of tithe rentcharge shall have been made in respect of any portion of tithe.' The object of the framers of the bill was clearly to exclude from the property qualification all persons who had a merely pecuniary interest in land. The owner of a rentcharge has no doubt parted with all his interest in the land subject to his right of re-entry on non-payment of the rentcharge, and the indefinite reservation of this right is still an unsettled question in respect of its validity under the law against perpetuities. The owner of a reversion in fee, remote though his interest may be, has an interest in the land itself, and stands in a different position from the owner of a rentcharge. Yet the disfranchisement of the latter is an illustration of the tendency of the Bill as regards the property qualification. So too is the case of the joint tenant. The Act of 1867 did not touch the case of joint owners, but dealt with joint occupiers, limiting the franchise to two of several occupiers of the same piece of land if the rateable value of the land was enough to qualify two, but permitting more than two to vote in respect of their joint occupation (always supposing the rateable value to be proportionate to the number of voters) if they had acquired their interest by descent, succession, marriage, marriage settlement

or devise, or were *bond fide* partners in business. The Franchise Bill deals with owners, and allows only one joint tenant or tenant in common to vote in respect of the interest so held, except under conditions which are in substance identical with those which the Act of 1867 imposed upon joint occupiers. Joint tenants if they care for a vote must henceforth scramble for a place on the register, and the vote will go to the man who most rapidly masters the learning of registration and shows the greatest promptitude in putting his knowledge into effect.

It is not, however, the object of this discussion to consider the political value of a non-residential franchise. It is sufficiently obvious that such a franchise enables one man to have a vote for more than one place; and that apart from the provisions of section 4 of the Franchise Bill, it afforded an opening for the creation of fictitious qualifications by means of rentcharges and joint tenancies. By a fictitious qualification one must understand a qualification based on a merely pecuniary interest, and divested of any care or responsibility for the use and management of the land out of which the interest arose.

But if the property qualification is to be retained at all, it is difficult to see why the voter so qualified, whose qualifying interest is in a borough, should not vote for that borough. It may be that the framers of the Bill, disliking the property qualification yet hesitating to propose its abolition, have retained it, subject to its limitation to counties, in a confident hope that the anomaly may not long survive. But if the qualification by residence which prevails in boroughs is to be extended to counties, and if the Franchise Bill professes (a false profession I fear) to make uniform the occupation qualification in counties and boroughs, it seems a mere perversity to exclude the property qualification from boroughs. If this qualification were assimilated in counties and boroughs the result would not be an extension of the franchise, but a transference of votes from county to borough. At present a man who has a £5 freehold in a borough and occupies enough land to qualify him for a county vote outside the borough boundary has but one vote, a vote for the county: but a man who has a £5 freehold in or near the borough and occupies business premises of the requisite value in the borough, has two votes, one for the borough and one for the county. In Scotland, as it would seem, property in a borough, apart from occupation, does not qualify either for borough or county.

This anomaly may perhaps be explained by dislike of a qualification based upon property and not involving residence: there is no such excuse for the anomalies and complexities of the

qualification by occupation. Of the complexity which surrounds this qualification I have already spoken, but the anomalies which it retains are surprising when we notice that the clause in the Bill which deals with it is headed with the words 'Assimilation of Occupation Qualification.'

For the value of the qualifying land or tenement is different in different parts of the United Kingdom. In England and Wales it is the clear yearly value (s. 5); in Scotland it is the annual value appearing in the valuation roll; and in Ireland the net annual value at which the land or tenement was last rated (s. 11). And since the rateable value of land is less than the clear yearly value, it follows that the Irish occupier will vote on a lower qualification than the English occupier.

Again, the borough occupier in England and Scotland must reside in or near the land or tenement which he occupies, the county occupier and the Irish borough occupier is under no such obligation.

And once more, the borough occupier must occupy, if he is tenant, under the same landlord; the county occupier, so long as the lands or tenements occupied are of the required value, may hold them under different landlords (*Huckle v. Piper*, L. R. 7 C. P. 197).

The second point which impresses any one who regards the Bill as a whole is the extraordinary complication in which it involves electoral rights. New qualifications are engrafted upon old statutes; clauses are repealed in old statutes but their provisions are to be read into the Franchise Bill; the Bill is to be construed so far as possible as one with the Representation of the People Acts (s. 11); these Acts wherever the expression occurs are to be held to include the Registration Acts (s. 8. sub-s. 1); and the Registration Acts in their turn are to be held to include the Rating Acts (s. 8. sub-s. 2). To put the matter shortly, some nine or ten Acts of Parliament are to be read into the Franchise Bill; of these some clauses are wholly repealed, as in the case of the county occupation franchise of 1832; some clauses are repealed but their terms are to be considered to survive, as in the case of the borough occupation franchise of 1832; some clauses have been repealed by previous Acts, and some are left in their entirety. This farrago is to be read as one enactment so far as is consistent with law, grammar and common sense, and from it the citizen of the United Kingdom is to extract with painful and laborious study the nature of his electoral rights. One may fairly complain of the Bill, regarding it simply as a work of legislative art, that it has not merely left existing difficulties unsettled; its provisions have thickened



in a manner almost incredible the darkness which previously enveloped our electoral law.

It may not be too much to hope that, now that the new franchises must cease to be discussed as matters of expediency and come to be interpreted as matters of law, a consolidating Act might be introduced and carried without creating renewed political excitement. It would not be amiss if some of the talk expended on the extension of electoral rights were given to the consideration of what those rights precisely are, and how the duly qualified elector is to ascertain them. At present they can only be even conjecturally ascertained by a careful comparison of numerous statutes, interpreted here and there by judicial decisions, and to some extent explained and systematised by writers of text-books. But leisure and a good law library are not at the disposal of every voter, and there are many 'capable citizens' who have no opportunity of becoming capable lawyers. A knowledge of electoral rights should be brought within the reach of every man, and it is part of the business of a legislature, though not perhaps its most ambitious or attractive business, so to shape the law on important matters that an unlearned man may understand it.

W. R. ANSON.

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THE KING'S PEACE<sup>1</sup>.

‘**A** GAINST the peace of Our Lady the Queen, her crown and dignity.’ This formula was once the necessary conclusion, as it is still the accustomed one, of every indictment for a criminal offence preferred before the Queen’s justices. Even to those who have nothing to do with assizes or quarter sessions the Queen’s Peace is a familiar term. By the widely spread office of justice of the peace it is brought home to the remotest corners of England. And it seems to us a natural thing that throughout the realm peace should be kept—in other words that unlawful force should be prevented and punished—in the Queen’s name and by officers armed with her authority. This does not look, on the face of it, like a fact requiring any special explanation. Our conception of an executive power, under whatever names and in whatever forms it is exercised, is that its first business is to preserve order. And that this power should be one and uniform in every part of a land ruled by the same laws appears to us so far from remarkable that anything contrary to it has the air of a puzzle and an anomaly. Such is our modern point of view, too obvious (one would think) to be worth stating. Yet it is so modern that there was demonstrably a time when it was an innovation. It belongs to the political theory of sovereignty which has superseded the feudal theory of autonomous personal allegiance. It assumes that the rights of private feud and war, rights exercised without contradiction far into the middle ages, are for us intolerable and impossible. It assumes, moreover, that a central authority has become strong enough to subdue local competition and jealousy. These conditions have been brought about in Western Christendom only by long processes of growth, strife, and decay. Perhaps examples might be assigned of lands and institutions where even yet they are not wholly fulfilled. The establishment of the King’s Peace is a portion, and in England no small one, of the historical transformation which has given us the modern in the place of the mediæval State. In the history of our law the steps are singularly well marked, and for that reason are worth our dwelling on. A clearly traced example in detail will assist our grasp of the general process.

Before we consider our English evidences, it is well to remember what is the state of things to which the King’s Peace is opposed. Modern as is the particular development to which I call your attention, both the need and the remedy were understood at a time ancient

<sup>1</sup> A Public Lecture delivered in the University of Oxford, May 24, 1884.

enough for the most exacting definition of antiquity. 'In those days,' says the chronicler in the Book of Judges, 'there was no king in Israel, but every man did that which was right in his own eyes.' And he explains his meaning by the case of Micah of Mount Ephraim, who 'had an house of gods, and made an ephod, and teraphim,' and by good fortune retained a wandering Levite, and knew that the Lord would do him good, seeing he had a Levite to his priest. But the tribe of Dan, or some clan of them, were seeking a place to dwell in, and their spies lodged in Micah's house, and took note of the images and the Levite. They also saw the city of Laish, and the people that were therein, 'how they dwelt careless, after the manner of the Zidonians, quiet and secure,' and reported to their brethren that it was an easy and desirable conquest, 'a place where there is no want of anything that is in the earth.' Whereupon the men of Dan set forth, six hundred men appointed with weapons of war, and, coming on their way to Micah's house, carried off the graven image, and the ephod, and the teraphim, and the molten image. The priest was easily persuaded to follow. 'Is it better for thee to be a priest unto the house of one man, or that thou be a priest unto a tribe and a family in Israel?' We hear nothing of Micah till the raiders were well on their way. But he then appears as doing exactly what, according to English law and usage of the twelfth or thirteenth century, he ought to have done. He raised the hue and cry, and pursued with as many of his neighbours as he could assemble.

'And when they were a good way from the house of Micah, the men that were in the houses near to Micah's house were gathered together, and overtook the children of Dan. And they cried unto the children of Dan. And they turned their faces, and said unto Micah, What aileth thee, that thou comest with such a company? And he said, Ye have taken away my gods which I made, and the priest, and ye are gone away: and what have I more? and what is this that ye say unto me, What aileth thee? And the children of Dan said unto him, Let not thy voice be heard among us, lest angry fellows run upon thee, and thou lose thy life, with the lives of thy household. And the children of Dan went their way: and when Micah saw that they were too strong for him, he turned and went back unto his house.'

Fortified by the possession of the idols and a real priest of the sacred tribe, the expedition went on to accomplish its main purpose. 'And they took the things which Micah had made, and the priest which he had, and came unto Laish, unto a people that were at quiet and secure: and they smote them with the edge of the sword, and burnt the city with fire.' They then built a new city.

whereof the graven image from Micah's house became the tutelar idol or Palladium. The story of its capture was preserved, one may suppose, as a tribal tradition, without any notion that the six hundred men appointed with weapons of war deserved anything but praise for their successful conduct of the enterprise. Such was right in the eyes of the men of Dan in the days when there was no king in Israel.

No parallel to this state of things can be found in modern Europe. But we have only to go to Asia to find it within the living memory of civilized observers. As Sir Alfred Lyall has pointed out, the episode of Micah and his household gods is as natural and intelligible to an Indian frontier officer as it is puzzling to the ordinary Biblical commentator. And there are still living under the Queen's rule men who have borne their share in exploits much like that of the six hundred of Dan, and who doubtless look on the English peace as a mischievous innovation, and regret the good old times when for their frontiers and hills there was no Governor-General in Council, and every man did that which was right in his own eyes. The same hand which has analysed in prose the religion of an Indian province has expressed in strong and brilliant verse the feelings of a superannuated freebooter of this sort. The old Pindaree, so far from being thankful for the Queen's Peace, would fain be forty years younger, to flee from this tyranny of law and order, where he is 'lectured by Káfirs and bullied by fat Hindus,' and get him to 'some far-off country where Mussulmans still are men'—in other words, where free fighting and plunder are to be had, and there are no Penal Codes administered by the infidel and impartial Gallios of the Indian Civil Service. These Asiatic instances will serve as an *auxilium imaginationis* to aid us in clothing with life and circumstance the meagre terms of the records which mark for us the first appearance of the King's Peace in our own land.

The custumals and ordinances of Kentish and West-Saxon chiefs and English kings which are collectively known as 'Anglo-Saxon laws' exhibit a state of society where private war is usual and lawful. It has, indeed, laws and regulations of its own. A man must not be attacked in his own homestead without being summoned to do his adversary right, and even then he is entitled to seven days' grace after the investment of his house before an assault is delivered<sup>1</sup>. In this sanctity of the homestead we

<sup>1</sup> Alfred, c. 42. This may be a comparatively recent 'temperament,' as Grotius would say. It is safer, however, to assume that the law is an express definition of older customary observance. I note here that documents are cited according to the arrangement in Schmid's *Gesetze der Angelsachsen*. I likewise note that I have not attempted to collect parallel examples from the Continent, though I doubt not such might be found: e.g. the Alsatian formula proclaiming peace during certain times, ap. Beatus Rhenanus, *Rer. Germ. lib. 2, s.f. Status Germaniae sub imperatoribus Saxonibus* (p. 97 in ed. 1531).

have one of the earliest securities for order; and it is one of the foundations, if not the chief foundation, of the institution we have now especially to examine. Every man was entitled to peace in his own house. The brawler or trespasser in another's homestead broke the owner's peace, and owed him special amends. We find this in the very earliest collection of ordinances, dating in substance at any rate from the first quarter of the seventh century. 'If in an earl's town [that is, enclosure or private holding; such is the primitive signification of the word, which survives in cognate languages and in many English place-names] one slays a man, let him atone it with twelve shillings. . . . The first who breaks into a man's town, let him atone it with six shillings, the next with three, after him a shilling each<sup>1</sup>. For slaying in the king's town the fine is increased to fifty shillings<sup>2</sup>, which makes it clear that in other cases too the fine here mentioned is payable not to the party directly injured, but to the householder. Similarly, misconduct in a man's house where the king is drinking must be paid for with a double fine<sup>3</sup>. The peace of a house is broken not only by slaying but by quarrelling. Whoever calls a guest in another's house mansworn, or uses other shameful words to him, incurs three distinct fines; one to the host, another to the injured party, and another to the king. The same law holds 'of old right' if one uncivilly removes another's cup where men are drinking; and the same fines are payable to the king and the householder if a weapon is drawn, though no actual hurt be done<sup>4</sup>. We find a curious echo of this ancient custom after the Conquest, in the so-called laws of Henry I, where there is a longer but much less clear statement that wherever men meet for drinking, selling, or like occasions, the peace of God and of the lord of the house is to be declared between them<sup>5</sup>. The amount payable to the host is only one shilling, the king taking twelve, and the injured party, in case of insult, six. Thus the king is already concerned, and more concerned than any one else; but the private right of the householder is also distinctly though not largely acknowledged. We have the same feeling well marked in our modern law by the adage that every man's house is his castle, and the rule that forcible entry may not be made for the execution of ordinary civil process against the occupier: though for contempt of Court arising in a civil cause it may, as not long ago the Sheriff of

<sup>1</sup> *Æthelbirht*, cc. 13, 17.

<sup>2</sup> *Ib.* 5.

<sup>3</sup> *Ib.* 3.

<sup>4</sup> *Hlóthar and Eádríc* (Kent, late seventh century), cc. 11-13. It is not quite clear what '*steóp ásette*' means. See Thorpe's and Schmid's notes.

<sup>5</sup> C. 81. The heading '*de pace regis danda in potatione*,' if not a later addition, shows that the compiler did not fully understand the text, which says '*pax Dei et domini inter eos qui convenerint . . . ponenda est*.' Here the '*dominus*' can be only the house-master: see § 2. The *fríðes-bóte* of *Æthelr.* vi. 32 (repeated in *Cnut*, ii. 8) seems also to refer to the peace of private householders.

Kent had to learn in a sufficiently curious form<sup>1</sup>. The theoretical stringency of our law of trespass goes back, probably, to the same origin. And in a quite recent American text-book we read, on the authority of several modern cases in various States of the Union, that 'a man assaulted in his dwelling is not obliged to retreat, but may defend his possession to the last extremity<sup>2</sup>.'

Under the West-Saxon rule, where the king's power was first consolidated, eventually to swallow up that of all the under-kings and princes of the English name, we find that breaking the peace of the king's house is a graver matter than anything yet mentioned. 'Whoso fights in the king's house, be all his heritage forfeit, and be it in the king's doom whether he have his life or not<sup>3</sup>.' There follow a series of graduated fines for fighting in a minster, in the house of an ealdorman or member of the Witan, or in that of a common man. Two centuries later the penalty for quarrelling in the king's hall is extended by Alfred to the drawing of a weapon. Fighting in the presence of bishops and ealdormen, in the folk-moot, and in a countryman's homestead, are forbidden under various pecuniary penalties<sup>4</sup>. Like provisions are repeated, with more or less variation, in later collections<sup>5</sup>. How far they were observed we do not know. Probably Sir Henry Taylor is no less true to history than to human nature in the exclamation he puts into the mouth of a partisan in the king's palace itself:—

'Keep the king's peace! If longer than three minutes  
I keep it, may I die in my bed like a cow.'

And it is said in one of the Irish legends of Ossian, with reference to a state of society perhaps not very different from that of Wessex in the seventh or eighth century, that he was never afraid but once, and that was when he saw a man die in his bed.

Thus far then every man has his own peace, of which the breach is a special offence. But the great man's peace is of more importance than the common man's, and the king's peace is above all, and is broken at the hazard of the offender's life and goods. In the spiritual order the peace of the Church commands yet greater reverence. But for practical purposes the Church by no means disdained the temporal sanction, and it seems well understood that where her peace is, there is the king's peace also, and the king's vengeance on breakers of it. 'Be every church in the peace of God and of the king and of all Christian folk.' 'Every church is

<sup>1</sup> *Harvey v. Harvey*, 26 Ch. D. 644.

<sup>2</sup> Cooley on Torts (1880), p. 168.

<sup>3</sup> Ine, c. 6. In § 1 there is no mention of *wife*. Presumably the Church's peace was too much *ex genere* for the king to claim anything in this case. Cp. the so-called Laws of Edward the Confessor, c. 6: 'Qui sanctae ecclesiae pacem frerit, episcoporum tum est justitia.'

<sup>4</sup> Cc. 15, 38, 39. Cp. too the graduated fines for trespass (*burh-bryce*) in c. 40.

<sup>5</sup> As Cnut, ii. 59.

lawfully in Christ's own peace, and every Christian man hath great need to know the great worship of this peace, because God's peace is of all peace most chiefly to be sought and most willingly to be held, and next thereto the king's<sup>1</sup>. Whoever broke the peace in a church, therefore, had to do with both the spiritual and the temporal power. And the graduation of ranks from the king's hall to the simple homestead does not fail of its analogy here. According to the rank of the church, so is the fine<sup>2</sup>. More than once the peace of a church within its walls is expressly declared to be as inviolable as the king's peace specially given, of which more anon. Land and life are equally forfeit by the breach of either<sup>3</sup>. The special protection given to well-conducted widows appears to come under this head, as being procured at the instance of the Church; for they are said to be in God's and the king's peace, and the declaration occurs in a context of ordinances chiefly ecclesiastical<sup>4</sup>. In later times, when the peace of the king in his temporal capacity had been extended so as to bring all sorts of offences within the jurisdiction of his courts, the special point of these expressions was forgotten, and 'the peace of God and of our lord the king' became a common form in criminal pleadings.

We have now to see how the king's peace was extended in respect of persons, occasions, and places. A general summary of the doctrine as understood about the time of the Conquest is given in a convenient form by the compilation known as *Laws of Edward the Confessor* (c. 12, cf. c. 27):—

'The king's peace is of many kinds. There is one given by his own hand, which the English call "kinges hand-sealde grið." Another of the day when he is first crowned; this lasts a week. At Christmas a week, and a week at Easter, and a week at Whitsuntide. Another given by his writ. Another belongs to the four roads: namely Watling-street, Foss, Hikenild-street, Erming-street, whereof two traverse the kingdom in length, the others in breadth. Another belongs to the waters, whereon provisions are shipped from sundry parts to cities and boroughs.'

The peace given by the king's hand (*cyninges hand-grið*) appears to be in the first instance a special privilege of persons in attendance on him or employed about his business. It is mentioned like a well-known and accustomed thing, but we have little

<sup>1</sup> *Æthelr.* vi. 13; *Cnut.* i. 2. *Alf.* 5 is already to the like effect.

<sup>2</sup> *Æthelr.* viii. 1-5; *Cnut.* i. 3. The rights of the Church are personified in a manner somewhat startling to modern usage: 'And þæt is þonne færest, þæt he his ágenne wer gesytle þám cyninge and Criste,' etc.

<sup>3</sup> *Edw. and Guth.* i; *Cnut.* i. 2, § 3. Compare cc. 1-15 of 'Be griðe and be munde' (Appendix iv, Schmid, *Eth. vii. of Ancient Laws*), a document of evident ecclesiastical origin.

<sup>4</sup> *Æthelr.* v. 21; vi. 26.

or nothing to show to whom or for what purposes it was commonly given. We may assume that the king's officers and messengers had it; perhaps others might have it by special favour. It would be quite in harmony with what we know of the king's court in the period immediately following the Conquest that his special 'hand-peace,' while it existed, should have been purchaseable. And it might often be worth a man's while to pay richly for it if he could; a merchant carrying money or jewels, for example. This, however, is conjectural. In any case, breach of the king's 'hand-grið' was an offence of the highest order, not being redeemable by any payment: whereas breach of the peace individually given or generally proclaimed by other authorities was a matter for compensation by a fixed scale of fines<sup>1</sup>. The peace-breaker, if he fled, was reckoned an outlaw; it was a serious offence to harbour him<sup>2</sup>, so serious that it was itself reserved for the king's justice. Only the king's grace could restore him to his rights as a free man. He might be lawfully slain if he resisted capture; this, at least, is expressly given as the tradition concerning breakers of the Church's peace, and we cannot suppose that the king's stood lower<sup>3</sup>. In much later times, it will be remembered, it was doubtful whether outlaws or persons attainted upon a *præmunire* (which last expressly includes being put out of the king's protection) might not be killed with impunity.

One particular application of the king's personal protection was to confirm the reconciliation of private enemies. When a man-slayer's composition has been accepted by the kindred of the deceased, the king's peace was to be declared between the parties, and terms fixed for payment by instalments<sup>4</sup>. The effect of this would be that if the kindred on either part attempted to repudiate the settlement at any time before full payment, they would expose themselves, not only to a renewal of the feud, but to the penalties and dangers which fell on a peace-breaker. Another use of this royal power is curious as foreshadowing the policy of encouragement and security to foreign traders which runs through the whole history of our commercial law. In Æthelred's treaty with the Danes we read: 'Let every man of those that are in peace with us have peace both by land and by water, both within harbour and without.' The ordinance goes on to say that in an

<sup>1</sup> Æthelr. iii. 1. It is not necessary to decide whether these other peaces were regarded as subordinate branches of the king's. The context rather suggests it by the association of the king's reeve with the alderman.

<sup>2</sup> Ib. 13.

<sup>3</sup> Edw. Conf. 6. And see the customs of Chester, Lincoln, Oxfordshire, and Berkshire, ap. Stubbs, Sel. Ch. 87, 90, 91 (2nd ed.).

<sup>4</sup> Edm. ii. 7; cp. App. vii. 1. § 3 (E. & G. 13, Thorpe).



enemy's land the ships and goods of the king's friends which may be found there are to have peace, except as to property mixed with that of the enemy. Even merchant-ships from an enemy's land are protected to a considerable extent. They may be wrecked if they are driven in by stress of weather, but if they come of free-will into an English port they are to have peace<sup>1</sup>. Here the alien trader, if he was to be protected at all, must be under the king's peace, as he would have no standing before any of the popular courts. Doubtless he also had the benefit of the general peace of the four roads and navigable rivers.

Then we find that certain feasts of the Church and other solemn assemblies are in the king's peace, more or less. As early as Alfred's time double fines are ordained for offences on Sundays and the greater feast days, and in Lent. There are also exhortations to keep the peace and avoid all manner of sin and strife at holy times<sup>2</sup>. But these appear to be nothing more than general good advice, like the Queen's proclamation read until very lately at the opening of assizes, purporting to forbid various things which the Crown certainly has at this day no legal power to interfere with. And the express mention of the double fine in certain cases is enough to show that stealing or fighting in Easter-week, for example, was not converted by the sanctity of the time into the higher offence of peace-breaking in the special sense. But the meetings of the Witan, the security of persons attending them, and the discipline of military expeditions, were by the eleventh century at any rate under the full sanction of the king's authority. 'I will,' says Cnut, 'that every man be of peace worthy on his way to gemót and from gemót, unless he be a notorious thief.' Again: 'If a man on the service of the host commit breach of the peace, let him lose life or wergeld<sup>3</sup>.' Thus the King's Peace, in a sort of artless fashion, anticipated the office of our Mutiny Acts and Articles of War. If we may trust a rather doubtful authority, the king's coronation feast was protected to the same extent<sup>4</sup>. The King's Peace at certain seasons likewise occurs as a local privilege; we find in Domesday that Dover had it from Michaelmas to St. Andrew's day<sup>5</sup>.

<sup>1</sup> Æthelr. ii. 2, 3. C. 3 may be principally meant to secure good treatment for friends of the English at the hands of the Danes. But c. 2 seems a quite general declaration for the benefit of commerce.

<sup>2</sup> Æthelr. v. 19; vi. 25; Cnut, i. 17. § 2 (all in nearly identical terms); cf. Cnut, ii. 38, 47; Henr. 62. § 1.

<sup>3</sup> Cnut, ii. 61, 82.

<sup>4</sup> Edw. Conf. 12, 27. But here observe that the offence is no longer bót-leás. Appointed fines, though very heavy ones, are mentioned.

<sup>5</sup> Perhaps such a *privilegium* was a doubtful privilege in the modern sense, for in case of breach the town paid a fine to the king. 'A festivitatem S. Michaelis usque ad festum Sci. Andreae treuua regis erat in uilla. Si quis eam infregisset inde propositus regis accipiebat communem emendationem . . . Omnes hae consuetudines erant ibi quando Willelmus rex in Angliam uenit.'

As to places, we find that in the eleventh century the limits of the king's court, within which his peace must be kept, are extended by an artificial definition. They are to be ascertained by taking from his actual residence a radius of three miles, three furlongs, and a minutely expressed fraction<sup>1</sup>. The compiler of the so-called Laws of Henry I. makes a not insignificant addition. 'Multus sane respectus esse debet, et multa diligentia, ne quis pacem regis infringat, maxime in ejus vicinia.' This 'maxime' shows that the establishment of peace in the precincts of the king's house appears to him only as a special and emphatic instance of an universal law. The exceptional and local character of the King's Peace is already obsolete for him, and hardly intelligible.

Of more importance, however, is the protection of the great roads, which was a settled rule by the time of the Conquest. In the laws of William the Conqueror we read: 'Of the four roads, to wit Watling Street, Erming Street, Fosse, Hykenild; whoso on any of these roads kills or assaults a man travelling through the country, the same breaketh the king's peace<sup>2</sup>.' These roads remained from the time of the Roman government of Britain. Watling Street is the best known of them. Starting from Dover, it passed through Canterbury, London, and Lichfield, to Wroxeter. Thence a later continuation of it turned northwards to the Mersey, and under the name of High Street was prolonged to the Roman Wall, while another branch struck off into Yorkshire. The Foss Way made, roughly, an opposite diagonal, its chief points being Ilchester, Bath, Cirencester, Leicester, and Lincoln.

Erming or Irmin Street appears to have connected London with the stations north of York by way of Huntingdon and Lincoln, crossing the Humber by a ferry. Icenhild or Hykenild (later commonly written Icknield) Way<sup>3</sup> may be described as very roughly parallel to the more important Foss Way. Starting from Wallingford on the upper Thames in a north-easterly direction, it crossed Watling Street at Dunstable and Erning Street at Royston, and went on through Icklingham to or near Venta Icenorum (Caistor St. Edmund's near Norwich). There were other well-defined roads, but these four were the main ones, and these alone were first recognized and guarded as the king's highways<sup>4</sup>.

<sup>1</sup> App. xii, Schmid; cf. Henr. 16.

<sup>2</sup> Will. i. 26.

<sup>3</sup> This is quite distinct from Rikenild or Ryknield Way, with which it was identified by some of the earlier antiquaries. (Higden ap. Palgrave, Eng. Comm. 2. cxxxviii).

<sup>4</sup> For the topography, see Guest, *The Four Roman Ways* (Origines Celticae, 1883, vol. 2. p. 218), and the map of Britain in Müller, Smith and Grove's *Atlas* (1874). Dr. Guest's paper is, in the posthumous essays above cited, reprinted from the *Archaeological Journal*, vol. 14. He gives the original forms of the names as Fos, Wætlinga Stræt, Icenhilde Stræt, Earminga Stræt. See also Green's 'Making of England,' *passim*. The statements in Schmid's Glossary, under the names of the several roads, stand in need of revision by the light of Dr. Guest's work.

Even for some time after the Conquest it would appear that other roads, though public, were not in the king's protection but only in the sheriff's<sup>1</sup>. But a tendency to enlarge the definition of the king's highway is already at work. '*Via regia dicitur quae semper aperta est, quam nemo concludere potest vel avertere cum minis (?) suis, quae ducit in civitatem vel burgum vel castrum vel portum regium*'<sup>2</sup>. '*Omnes herestrete omnino regis sunt*'<sup>3</sup>. First, only the four roads are the king's; then every common road which leads to the king's city, borough, castle, or haven; and as most roads of any importance must, sooner or later, answer this description if followed far enough, the king's highway came to be, as it now is, merely a formal or picturesque name for any public road whatever. As late as the fourteenth century, however, it was an opinion still held by some that not every common road was royal, insomuch that the soil and freehold of a common road could be vested in an individual owner only if it was not *via regia*<sup>4</sup>. The very survival of the term 'the king's highway' shows that the idea of peculiar legal sanctity clung about highways in popular imagination long after they had ceased to be more under the king's peace than any other English ground. Echoes and revivals of the same feeling occur in the Statute-book. By the Statute of Marlbridge all men save the king and his officers are forbidden to take a distress on the king's highway or any common road (in *regia via aut communi strata*). And an Act of Henry VIII (24 Hen. VIII. c. 5, entitled 'An Act where a man killing a thief shall not forfeit his goods') made it justifiable homicide to kill any one attempting robbery or murder 'in or nigh any common highway, cartway, horseway or footways.'

The same reign, it may be noted, presents a curious reminiscence of the sanctity of the King's Peace within his own house: I mean the Act which imposed the penalty of losing the right hand on any one guilty of 'malicious striking by reason whereof blood is or shall be shed against the king's peace' within the precincts of any palace or residence of the king<sup>5</sup>. The statute presents in the minuteness of its directions a curious compound of ferocity with a sort of rude humanity.

In all these ways the King's Peace was enlarged in the age immediately preceding the Conquest, and tending to become the general peace of the kingdom. The interests of the king and of the

<sup>1</sup> Edw. Conf. 12. § 9.

<sup>2</sup> Henr. 80. § 3. The final *regium* is omitted by one MS. *Minis* must be corrupt. The variant *ruinis*, 'rubbish,' is more plausible. One might suggest *maris*, if *marus* would bear the general sense of inclosure or purpresture.

<sup>3</sup> Ib. 10. § 2. Herestret = *Heerstrasse*, a main road fit for military purposes.

<sup>4</sup> Y. B. 6 Ed. 3. 23. pl. 48.

<sup>5</sup> 33 Hen. VIII. c. 12.

subject conspired to the same end. It was for the king's manifest advantage to widen the bounds of his jurisdiction for the purpose of increasing the fines and forfeitures incident to its exercise. This kind of competition for business and fees between independent or half-independent powers is the key, we need hardly remind the reader, to much of the legal history of the Middle Ages, and explains some of its oddest details. It was no less for the subject's advantage to be able to appeal for redress to the one authority which could not anywhere be lightly disobeyed. How the completion of the process should be carried out was more or less an affair of occasion and accident. As in other cases, the Conquest makes a gap in the continuity of the evidence, and obscures the exact sequence of things, while nevertheless it hastens and consolidates, on the whole, the result already impending. We do not know, for example, how a man proved that he had the king's special peace. We do know that in later times the averment of a trespass being committed against the King's Peace, or that the person injured was in the King's Peace, neither required nor was capable of proof, but still was necessary to give the Superior Court jurisdiction. We may imagine a transition period in which the judges were ready, on some very slight suggestion, to presume as between the king and the sheriff that the King's Peace had been specially granted to the plaintiff, or to a man unlawfully slain. It is true that the Crown had assumed concurrent or exclusive jurisdiction (subject only to the possibility of a special grant of regalities to a subject) over various offences and trespasses, while breach of the King's Peace was still nominally only one specific offence. From the point of view of amplifying jurisdiction, therefore, the extension of the King's Peace may not seem to have been so urgent. But these offences reserved to the Crown are really of the same class. The list as given for Wessex in Cnut's laws (ii. 12) is as follows :—

þis syndon þá gerihta, þe se cyning áh ofer ealle men on Westsexan, þæt is mund-bryce and hám-sócne, forstal and flýmena-fyrmðe and fyrd-wíte, buton he hwæne furðor gemædrian wylle, and he him þæs weorðscipes geunne.

Mund-bryce is the same as grið-bryce, breach of the king's special protection, of which we have already heard. Hám-sócne is an attack in force on a man in his homestead (saving, I presume, all rights to the regular prosecution of a feud). The offence is to this day known to the law of Scotland as hamesucken. It would according to the older notions be a breach of the householder's peace, not of the king's. But the very fact of the king assuming jurisdiction in such cases is evidence that the distinction could not

be long maintained. Already in the laws of Edmund, before the middle of the tenth century, this offence is on the same footing as *mund-bryce*: the penalty being the same, and expressed in almost the same words, as that of the laws above mentioned which forbid fighting in the king's house<sup>1</sup>. The exact meaning of *forstal* (more commonly written *forsteal*) is not free from doubt. But it included attacking one's enemy by stealth while he was journeying: so that, if committed on any of the great roads, the offence would be against the King's Peace according to the authorities cited above. *Flýmena-fyrmðe*, the harbouring and comforting of outlaws, is closely connected with substantive offences against the king and his peace, for such offences were the gravest and probably the most frequent cause of outlawry<sup>2</sup>. *Fyrd-wite*, the public fine for making default in military service, must have been in the king's hands, as captain of the host, from the time of its first institution. It disappears, however, with the change of military system after the Conquest. Thus, on the whole, an easy way is prepared for Pleas of the Crown, as we now say, and breaches of the King's Peace to become co-extensive. It is curious to see how much the list is increased in the generations following the Conquest (*Leges Henrici Primi*, c. 10).

The exception of cases where the king might be pleased especially to honour any man (namely, by the grant of *jura regalia*) was preserved, in form, almost to our own time. Where such a grant had been made, the effect was to substitute the peace of the lord to whom the grant was made for that of the king. And in the Counties Palatine of Lancaster and Durham, while their separate jurisdictions were maintained, the style of pleading was not *contra pacem regis*, but *contra pacem ducis, comitis, or episcopi* as the case might be<sup>3</sup>.

After the Conquest, then, the various forms in which the king's special protection had been given disappear, or rather merge in his general protection and authority: for the details that occur in the compilations bearing the names of Henry the First and Edward the Confessor, welcome as they are by way of supplement to earlier documents, are mere echoes of traditions no longer living. The King's Peace is proclaimed in general terms at his accession<sup>4</sup>. But, though generalized in its application, it still was subject to a strange and inconvenient limit in time. The fiction that the king is everywhere present, though not formulated, was tacitly adopted; the protection once confined to his household was extended to the

<sup>1</sup> Edm. ii. 6.

<sup>2</sup> It is worth note that an outlaw's bookland is forfeit to the king, whether he be the king's man or not: Cnut, ii. 13.

<sup>3</sup> Blackstone, i. 117.

<sup>4</sup> Palgrave, i. 285.

whole kingdom. The fiction that the king never dies was yet to come. It was not the peace of the Crown, an authority having continuous and perpetual succession, that was proclaimed, but the peace of William or Henry. When William or Henry died, all authorities derived from him were determined or suspended; and among other consequences, his peace died with him. What this abeyance of the King's Peace practically meant is best told in the words of the Chronicle, which says upon the death of Henry I (*anno* 1135): 'Then there was tribulation soon in the land, for every man that could forthwith robbed another.' Order was taken in this matter (as our English fashion is) only when the inconvenience became flagrant in a particular case. At the time of Henry III's death his son Edward was in Palestine. It was intolerable that there should be no way of enforcing the King's Peace till the king had come back to be crowned; and the great men of the realm, by a wise audacity, took upon them to issue a proclamation of the peace in the new king's name forthwith<sup>1</sup>. This good precedent being once made, the doctrine of the King's Peace being in suspense was never afterwards heard of.

Thus by the end of the thirteenth century, a time when so much else of our institutions was newly and strongly fashioned for larger uses, the King's Peace had fully grown from an occasional privilege into a common right. Much, however, remained to be done before the king's subjects had the full benefit of this. The local officers of justice were still no ministers of the king or of his courts; local interests and jealousies might still come in the way of the effectual and comparatively speedy redress which the king's power alone could give. A remedy was not difficult to devise; it lay in the appointment of other officers commissioned directly by the king, and charged to maintain his peace and his rights of jurisdiction. A beginning of this was made as early as 1195 by the assignment of knights to take an oath of all men in the kingdom that they would keep the King's Peace to the best of their power<sup>2</sup>. Like functions were assigned first to the old conservators of the peace, now all but forgotten, then to the justices who superseded them, and to whose office a huge array of powers and duties of the most miscellaneous kind have been added by later statutes. The steps by which this was effected are part of the technical history of the modern law, and it does not concern us here to recall them. Then the writ *de securitate pacis* made it clear beyond cavil that the king's peace was now, by the common law, the right of every lawful man. The precept to the sheriff is that he cause the complainant to have of the person who threatens him 'our strict peace

<sup>1</sup> Stubbs, *Select Charters*, p. 448.

<sup>2</sup> *Ibid.* p. 264.

according to the custom of England.' Binding persons over to keep the peace is in our days one of the commonest forms of summary jurisdiction, and one cannot claim for it any peculiar dignity. Probably it is more familiar in rustic parts than almost any legal institution, and more cherished though less imposing and exciting than the pomp of assizes. If its precise operation is not understood, belief in its efficacy loses nothing. We have heard of an application being made in good faith to a Devonshire magistrate to 'swear the peace upon' a dying man, to the end of securing the complainant (his wife) from the threatened visitation of his ghost, in the event of her contracting a second marriage of which he disapproved. But if we can clear our imagination from anecdotes of petty sessions and go back to the old form of the writ in Fitzherbert, we shall find in it a gravity and weightiness not unworthy of a great legal reform. We must not think of it as being in its early days a mere preventive of common assaults, an economizer of the 'little diachylon' made immortal by Holt in *Ashby v. White*. Rather it must have been a material instrument in the suppression of wrong-doing on a more formidable scale, of tumultuous revenges and private warfare; a task for which all the power at the disposal of the Crown was none too much.

We said that the king's peace and protection had become the established right of every peaceable subject. Nevertheless a trace of the archaic ideas persisted as long as the art of common law pleading itself. The right was to be enjoyed only on condition of being formally demanded. In order to give the king's courts jurisdiction of a plea of trespass it was needful to insert in the writ the words *vi et armis*, which imported a breach of the peace; and it was usual, if not necessary, also to add expressly the words *contra pacem nostram*. Without the allegation of force and arms the writ was merely 'vicountiel,' that is, the sheriff did not return it to the Superior Court but had to determine the matter in the County Court<sup>1</sup>. By so many steps and transformations did it become possible for Lambarde, and Blackstone after him, to say<sup>2</sup>, with unconscious inversion of the historical order of development, and as if the matter were in itself too obvious to need explanation: 'The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it: hence it is usually called the King's Peace.'

FREDERICK POLLOCK.

<sup>1</sup> F. N. B. 86.

<sup>2</sup> Comm. i. 349, 350.

## HOMICIDE BY NECESSITY.

**T**HE case of Dudley and Stephens, the survivors of the crew of the *Mignonette*, who were tried for the murder of their companion Parker at the Exeter Autumn Assizes, has been decided by the full Court too late for us to discuss the judgment. But as the case touches wider questions than were covered by the decision, some account of the authorities may still be not without interest.

The shortest and best account of the facts, and the only one which has any legal authenticity, is the verdict of the jury. It is in the following words:—

‘That, on July 5, 1884, the prisoners, with one Brooks, all able-bodied English seamen, and the deceased, an English boy between seventeen and eighteen, the crew of an English yacht, were cast away in a storm on the high seas, 1,600 miles from the Cape of Good Hope, and were compelled to put into an open boat; that in this boat they had no supply of water and no food, except two 1-lb. tins of turnips, and for three days they had nothing else to subsist on; that on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day, when the act now in question was committed; that on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat; that they had no fresh water, except such rain as they from time to time caught in their oilskin capes; that the boat was drifting on the ocean, and was probably more than a thousand miles from land; that on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested some one should be sacrificed to save the rest, but Brooks dissented, and the boy, to whom they were understood to refer, was not consulted; that on the day before the act in question Dudley proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots; that on that day the prisoners spoke of their having families, and suggested it would be better to kill the boy that their lives should be saved, and Dudley proposed if no vessel was in sight by the next morning the boy should be killed; that next day, no vessel appearing, Dudley told Brooks he had better go and have a sleep, and made



signs to Stephens and Brooks that the boy had better be killed. [That] Stephens agreed to the act, but Brooks dissented from it; that the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to being killed; that Dudley, with the assent of Stephens, went to the boy, and telling him his time was come, put a knife into his throat and killed him; that the three men fed upon the boy for four days; that on the fourth day after the act the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration; that they were carried to the port of Falmouth, and committed for trial at Exeter; that if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued; but would within the four days have died of famine; that the boy, being in a much weaker condition, was likely to have died before them; that at the time of the act there was no sail in sight, nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then or very soon fed upon the boy or one of themselves they would die of starvation; that there was no appreciable chance of saving life except by killing some one for the others to eat; that assuming any necessity to kill any one, there was no greater necessity for killing the boy than any of the other three men; but whether upon the whole matter the prisoners were and are guilty of murder, the jury are ignorant, and refer to the Court.'

As the indictment upon which the men were tried was for murder, there could of course arise no question of any crime except murder or manslaughter, but it may possibly be the case that these findings might be held to amount to a conviction of misdemeanour at common law, if the prisoners had been charged only with that offence. At the same time I have been unable to discover any mention of cannibalism in the text-books, except in the capacity of a possible motive for homicide, and it has usually been the practice of the Courts to declare to be misdemeanour only those unprecedented acts appearing to call for reprobation, the commission of which is injurious to the general public<sup>1</sup>. It is difficult to see how the eating of a dead body can affect the public at large, when no one is there to see it done except those who participate in the act<sup>2</sup>, and when the only people to whom it could possibly make any difference are the executor or other persons responsible for the burial of the body.

<sup>1</sup> See Stephen's Digest of the Criminal Law, chap. xvi.

<sup>2</sup> [But the same remark applies to at least one other grave criminal offence which is punished in the interest of public morality and decency.—Ed.]

The nearest approach to a precedent seems to be the case of *The Queen v. Price* (12 Q. B. D. 247), in which it was held that cremation is not, *per se*, unlawful. To some people the burning of a dead body appears not less objectionable than the eating of it does to others; yet there is express authority to the effect that it is not an offence to burn a corpse if it is done in such a manner as not to annoy those of the public who happen to be near. At the same time it would be rash to predict what might happen to a person who ate the flesh from a corpse, to the possession of which he was legally entitled, not because he was starving, but because he liked it. It is not necessary to say more upon the question, which did not arise in the present case, whether cannibalism is a nuisance, or otherwise a misdemeanour, at common law.

Apart from the question of cannibalism, there can be no doubt that the killing of Parker was murder if it was a crime at all. No intentional killing can be manslaughter except where there is provocation of one of the few and definitely ascertained kinds which avail to reduce the killing to manslaughter. Here there is no suggestion of provocation of any of those kinds, and there is the clearest intention. The alternative of the act not being a crime at all, whatever speculative ethics and 'Naturrecht' might have to say to it, was generally felt to be untenable: and the decision of the Court that it was murder was not only expected but inevitable.

The justification or excuse set up for Dudley and Stephens was that they acted under what is termed by Mr. Justice Stephen, in the *History of the Criminal Law* (vol. ii. p. 108), 'Compulsion by Necessity,' which, he says, 'is one of the curiosities of law, and so far as I am aware is a subject on which the law of England is so vague that, if cases raising the question should ever occur, the judges would practically be able to lay down any rule which they considered expedient.' It is not always easy, in investigating this subject, to avoid a confusion which may arise from the use of the word 'compulsion.' It is sometimes used in a perfectly general sense, when it includes compulsion by necessity, and at other times with the special meaning of compulsion by threats. No doubt threats to take a man's life are one form of necessity, but the law relating to that kind of compulsion is so well defined, and the distinction between it and the compulsion which we are now considering (in which there is no human agency except on the part of the person compelled), is so clearly marked, that I do not propose to make any further allusion to it, or to include it under the expressions 'compulsion' or 'necessity' on any occasion of my having to use one of those words.

Compulsion by necessity is described in the following terms in Article 32 of the 'Digest of the Criminal Law: Crimes and Punishments':—

**'Necessity.'**

'An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.'

**'Illustrations.'**

'(1) *A*, the Governor of Madras, acts towards his Council in an arbitrary and illegal manner. The Council depose and put him under arrest, and assume the powers of government themselves. This is not an offence if the acts done by the Council were the only means by which irreparable mischief to the establishment at Madras could be avoided.

'(2) *A* and *B*, swimming in the sea, after a shipwreck, get hold of a plank not large enough to support both; *A* pushes off *B*, who is drowned. This is not a crime.'

The second of these illustrations is founded upon a hypothetical statement of respectable antiquity, believed to have been introduced into this country by Bacon. The first is founded upon the charge delivered to the jury by Lord Mansfield in the case of *R. v. Strutton and others* (reported in 21 State Trials, 1224). The facts were, briefly, those stated in the illustration, and Lord Mansfield said, among other things, 'Imagination may suggest, you may suggest so extraordinary a case as would justify a man by force overturning a magistrate and beginning a new government all by force. I mean in India, where there is no superior nigh them to apply to: in England it cannot happen; but in India you may suppose a possible case, but in that case it must be imminent, extreme necessity; there must be no other remedy to apply to for redress; it must be very imminent, it must be very extreme. . . .' In the result the defendants were all convicted, but escaped easily with a fine of £1000 each. It would be a large inference to make from this case, treating of 'civil necessity,' that a sufficiently imminent and extreme necessity of not being starved makes it excusable to cut your neighbour's throat. Of course in the case of the plank, supposing it to be authoritative, the necessity is in many ways more 'extreme and imminent' than the necessity

shown in the special verdict, and one of the principal points for consideration will be how nearly the probabilities mentioned in it approach to the kind of extremity and imminence described or suggested by Lord Mansfield.

In the 'Criminal Code Bill' drawn by Sir James Stephen and introduced into the House of Commons by the late Sir John Holker in 1878, section 23 runs as follows:—

**'Necessity.**

'No act is an offence which is done only in order to avoid consequences which could not otherwise be avoided, and which if they had followed would have inflicted upon the person doing the act, or upon others whom he was bound to protect, inevitable and irreparable evil, and if no more is done than is reasonably necessary for that purpose, and if the evil intended to be inflicted by such act is neither intended nor likely to be disproportionate to the evil intended to be avoided.

'No act which causes harm to the person of another is an offence if the person doing it was, without any fault on his part, so situated at the time that he could not avoid doing the act which caused such harm, without doing some other act which was equally likely to cause harm to some other person (not being himself), and if he did the one act only in order to avoid doing the other.'

Two qualifications follow, not material to the present inquiry.

No section corresponding to this was inserted in the Draft Code prepared by the Criminal Code Bill Commissioners in 1879. The subject is treated of in Note A to that Report. The first part of Note A concerns compulsion by threats, and refers to the 'stern rule' of Lord Hale, that when a man is threatened with instant death if he does not commit a murder 'he ought to die himself rather than kill an innocent<sup>1</sup>.' The Note goes on:—

'But compulsion is only one instance of a justification on the ground that the act, otherwise criminal, was necessary to preserve life.

'A case of frequent occurrence is where a thief says he was starving and could not save his life unless he stole. Lord Hale, after stating the rule laid down by some casuists that this was justifiable, says emphatically, "I do therefore take it that where persons live under the same civil government, as here in England, that rule, at least by the laws of England, is false; and

<sup>1</sup> This passage was cited by the Lord Chief Justice during the argument as an authority of general application. Hale seems to have been assuming the simple alternative of murdering or being murdered; but the present case was complicated by the finding of the jury that the boy would probably have died anyhow, and that the three survivors would probably have died but for eating his flesh. No such distinction, however, was raised by the counsel for the defence.

therefore if a person being under necessity for want of victuals or clothes shall upon that account clandestinely and *animo furandi* steal another man's goods, it is felony." And he gives an excellent reason: "Men's properties would be under a strange insecurity, being laid open to other men's necessities, whereof no man can possibly judge but the party himself."

'But Lord Hale admits that this general principle is subject to some exceptions. He says, "Indeed this rule *In casu extremæ necessitatis omnia sunt communia* does hold in some particular cases, when by the tacit consent of nations or of some particular country or countries it hath obtained. . . . By the Rhodian Law and the common maritime custom, if the common provision for the ship's company fail, the master may under certain temperaments break open the private chests of the mariners or passengers and make a distribution of that particular and private provision for the preservation of the ship's company."

'Such cases have frequently happened, and the law has been settled as to them. But ingenious men may suggest cases which, though possible, have not come under practical discussion in courts of justice. Casuists have for centuries amused themselves, and may amuse themselves for centuries to come, by speculating as to the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one. If ever such a case should come for decision before a court of justice (which is improbable), it may be found that the particular circumstances render it easy of solution. We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case.'

Puffendorf, in the '*Jus Naturæ et Gentium*,' has some speculations upon the general question of killing others as the only way of saving one's own life, and also upon the particular case of killing them for food. The following extract, which mentions the case referred to by Baron Huddleston in his charge to the grand jury at Exeter, is from Kennett's translation:—"We may proceed, therefore, to examine what right *necessity* can give us over others. To feed on man's flesh, in the desperate extremity of famine, when no other sustenance can be procured, is a lamentable, indeed, but not a sinful expedient. But as for those instances when in distress and want of all provisions, men have been killed to preserve their fellows, either by compulsion, and against their consent, or else by the determination of lot, the decision of them is a point of some

difficulty and uncertainty. Inasmuch as whatever the law against murder suggests on one side, the sharpness of hunger pleads as loud on the other; and the belly, that advocate without ears: especially considering that unless this *unhappy* means was made use of, the whole company must have inevitably perished. This is one of those cases in which a man ought to die rather than commit the fact, it being directly contrary to the laws both of God and nature. To this purpose we have a story of some Englishmen, who being tossed in the main ocean without meat or drink, killed one of their number on whom the lot fell, and who had the courage not to be dissatisfied, assuaging in some measure with his body their intolerable and almost famished condition: whom when they at last came to shore, the judges absolved of the crime of murder.' When the case was argued, on the 4th of December, some time after this paper was written, this story had been traced to a Dutch writer in the seventeenth century, who referred to it merely on account of its medical interest. It appears that the Englishmen were driven out to sea by stress of weather, from St. Kitt's, then a newly founded colony, that after eleven days they drew lots, and killed the man upon whom the lot fell, who is said to have 'made a speech,' thanking them for being about to do so. On their arrival at St. Kitt's the survivors were pardoned, without any trial, presumably by the Governor. Puffendorf goes on to say that he will 'suspend his positive judgment' as to whether, when 'in a shipwreck more men leap into the little boat than it is able to carry'—Holmes's case in fact—they ought to draw lots 'who should be cast overboard,' and whether, if they do draw lots, any one who refuses to draw may lawfully be cast overboard 'without further deliberation,' because the case is so unlikely to occur. But the note, by Barbeyrac, contains a singular speculation that 'the master of the shallop doth not seem to be obliged to draw lots with the others, whom he permitted out of pity to come into it, and consequently might have excluded to have saved himself.' I suppose the master of the shallop would generally be the captain of the ship, in which case, assuming that lots were to be drawn, I doubt if he would do well to insist upon this view of his rights.

I now come to the nearest direct precedent, which is the American case of Holmes, who was convicted of manslaughter and sentenced to a short term of imprisonment by the United States Circuit Court for the Eastern district of Pennsylvania, under the following circumstances:—

He had been a sailor on board a ship which struck on an ice-berg and was soon after discovered to be foundering. So many people crowded into the boat in which Holmes escaped that

the gunwale was only a few inches above the water. After they had been about twenty-four hours in the boat the sea rose, and the water washed in. Eventually Holmes and others threw a number of the passengers into the sea, and the rest were saved. Baldwin, J., who tried the case, laid great stress on the fact that there were more sailors in the boat than were required for its proper management, from which, he said, it followed that the superfluous sailors ought to have been thrown out first, the individual selection being made 'by ballot.' He goes on: 'There is, however, one case in which all writers agree, and one rule which seems to meet with universal consent, when the ship or boat is in no danger of sinking, and all sustenance is exhausted, whereby it becomes necessary to make one a sacrifice to appease hunger; the selection is by lot, that being resorted to as the fairest mode, and deemed to be in some measure an appeal to Providence to choose the victim. We have neither heard, read, nor known any other mode, and can conceive none so consonant to justice and humanity.'

In regard to this case I cannot understand why Holmes was charged with manslaughter and not with murder, and I do not think that such a conviction could possibly take place in England. Perhaps the jury of the United States Circuit Court was an independent body and objected to the prisoner's being sentenced to death when they knew that that sentence would not be carried out. When this case was mentioned during the argument, Baron Huddleston suggested that the view taken was that Holmes caused death by a breach of his statutory duty to carry the passengers safely. No doubt he did, and he was also guilty of assault and battery at common law, but that would not be a sufficient reason in England for indicting him for misdemeanour. The judges were all of opinion that in the case under consideration the question of manslaughter did not arise.

As to people being bound to cast lots, that view was not even suggested in the present case, and it will certainly have to be supported by some authority very different from that of Puffendorf and the other writers on the 'Law of Nature' before it has any weight in an English Court. It is enough to point out here, that many questions might arise on the subject: for instance, if every one agreed to cast lots and abide by the result would the killing of the person who drew the fatal lot be murder, (1) if he assented to his own death, (2) if he changed his mind and resisted? And in the latter case would it be murder if he in self-defence killed some one? Or, if one or more persons dissented from the drawing of lots, would that have any and what bearing on the legal effect (if any) that the drawing of lots would

otherwise have? and would it, as Puffendorf suggests, be lawful to take the life of one person who alone refused to draw lots? and what would be the result if he killed some one in resisting an attempt to kill him?

The following is the 81st section of the Indian Penal Code, under which, I suppose, a case similar to that of Dudley and Stephens would have to be tried in India:—

‘Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

*Explanation.*—It is a question of fact in such a case, whether the harm to be prevented, or avoided, was of such a nature, and so imminent, as to justify, or excuse, the risk of doing the act, with the knowledge that it was likely to cause harm.

#### ‘Illustrations.

‘(a) *A* the captain of a steam vessel, suddenly, and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat *B* with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat *C* with only two passengers on board which he may possibly clear. Here if *A* alters his course without any intention to run down the boat *C*, and in good faith for the purpose of avoiding the danger to the passengers in boat *B*, he is not guilty of an offence, though he may run down the boat *C*, by doing an act which he knew was likely to produce that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat *C*.

‘(b) *A* in a great fire pulls down houses in order to prevent the conflagration spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A*’s act, *A* is not guilty of the offence.’

This section appears to me to mix up, in the most perplexing manner, the question of law whether an intention is criminal, and the question of fact whether a person had a certain intention, and the question (which is really two questions, one of fact and one of law, but is made one question of fact) whether the harm to be prevented was of such a nature as to justify or excuse the accused



person in taking the risk of preventing it. Mr. J. D. Mayne, the learned editor of the Penal Code, observes, by way of commentary on the section, 'This section is very obscure. Every person is supposed to intend what he knows will happen. If he knows an act will cause harm he is supposed to intend harm, and an intention to do harm is, *prima facie*, criminal. We are not told, except by the illustrations, what are the circumstances under which such an act could be done without a criminal intention. Nor are we told whether the harm to be prevented, or avoided, must be harm to others, or may be merely harm to the person himself.'

Then, after some further speculations as to the effect of the section, Mr. Mayne proceeds: 'The more important question remains, whether a man is justified in doing an injury to others to prevent an injury to himself? For instance: if he is starving, may he steal? . . . The only instance in which the English law admits that one man may sacrifice the rights of an innocent man for his own interests, is such a case as that of two shipwrecked men getting upon a plank which will only support one, where either may thrust off the other if he can. But here plainly the only question is whether one or both are to perish.' Mr. Mayne then refers to the Notes on the original draft of the Indian Penal Code now published in Lord Macaulay's Works (edited by Lady Trevelyan, 1875). I think the following extracts from 'Note B' are all that throw any light upon the present case:—

'We have long considered whether it would be advisable to except from the operation of the penal clauses of the code acts committed in good faith from the desire of self-preservation, and we have determined not to except them. . . . It would, we think, be mere useless cruelty to hang a man for voluntarily causing the death of others by jumping from a sinking ship into an overloaded boat.' But it is the opinion of the Commissioners that, as a general rule, persons guilty of such crimes as this ought to be punished, so as to keep up a high standard of morals.

'Again, nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts. It is certain . . . that when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not keep him from committing theft; yet it by no means follows that it is irrational to punish him for theft; for though the fear of punishment is not likely to keep any man from theft when he is actually starving, it is very likely to keep him from being in a starving state.' They point out how seriously idleness and vagabondage would be promoted by a law that having gone thirty-six hours without food should be an excuse for stealing

it, and conclude: 'We should therefore think it in the highest degree pernicious to enact that no act done under the fear even of instant death should be an offence. It would *a fortiori* be absurd to enact that no act under the fear of any other evil should be an offence.' The first framers of the Code, for these reasons, preferred not to lay down any exception, but to leave the whole matter to the executive discretion of the Government, 'which, in the exercise of its clemency, will doubtless be guided in a great measure by the advice of the Courts.'

Section 81 of the Code as it now exists was inserted on subsequent revision before the Code became law, and attempts to some extent to solve the problem which had seemed to the Indian Law Commissioners incapable of legislative solution. But how far it does extend, or how far it would apply (if at all) to such a case as that of Dudley and Stephens, it is extremely difficult to say.

HERBERT STEPHEN.

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## HOLTZENDORFF'S ENCYCLOPÄDIE.

**D**URING the last thirty or forty years a very strong movement has taken place in this country in favour of the promotion of systematic legal studies. English people want to attain a comprehensive view of their own law, but they find it scattered about in thousands of Acts of Parliament and in endless volumes of law reports, and thus a knowledge of law is necessarily limited to those who make it their special study and profession. This state of things is not better than it was in ancient Rome, where law was a mystery the knowledge of which was confined to the patrician priesthood. We may say, it is still worse, for even English lawyers do not know the principles of the *whole* sphere of law, being in want of the means to get a comprehensive view of it.

It is natural that under these circumstances, the wish to have English law brought into a form which would make its study accessible for everybody who is interested in it, becomes stronger and stronger. Since the day when Bentham first used the word 'Codification,' the wish to have English law codified has been expressed with increasing frequency. And, indeed, this wish is the main-spring of the active movement which has taken place in this country.

But it cannot be accomplished at once. In order to codify existing law it must have previously existed in the form of a scientific system, i.e. in the form of rules which are abstracted from the sources of law (statutes, decided cases or 'books of authority') and arranged according to certain leading conceptions. Fortunately steps have been taken in this direction which justify us in taking a hopeful view of the future development of English jurisprudence and legislation. Thus, although there does not yet exist a scientific system of English Private Law, single branches of it, such as the law of contract, have been carefully elaborated.

It may therefore be supposed that English readers, especially those who are professionally interested in law, will welcome a work which affords a strong evidence of the success of legal study and legislative activity. This is done in a way which, in our judgment, has not yet been surpassed, in the *Encyclopaedia of Jurisprudence*, edited by Professor Franz von Holtzendorff of Munich<sup>1</sup>. The work is divided into two portions, a systematic and an alphabetic part.

<sup>1</sup> *Encyklopädie der Rechtswissenschaft in systematischer und alphabetischer Bearbeitung*. Herausgegeben unter Mitwirkung vieler Rechtsgelehrter von Dr. Franz von

The former contains a general exposition of the philosophy and history of law as well as of the law actually in force in a series of distinct essays, each dealing with a single department of law, and written by one of the best authorities upon the subject. It is, of course, this section of the work—now published in the fourth edition—which deserves the special attention of English readers.

Although the work edited by Professor Holtzendorff is called 'Encyclopaedia of Jurisprudence,' it is not intended to treat of all existing law, but only of law relating to the German Empire. This primary reference to German law will however not prevent the work from being deeply interesting to readers of other nationalities, and especially to Englishmen. And that for two reasons:—

1. It gives an explanation of a *whole* legal system in all its branches, and thus offers to us a summary of all the different rules which determine human actions within a certain orbit. To bring about a state of things which would make a similar summary of English law a possibility is the object which English lawyers have in view, an object which cannot be gained without the study of a particular legal system of one nation, since law does not exist abstractedly, i. e. without a certain set of people the relations of which are governed by it.

2. Its contents, as comprising the exposition and development of the whole law relating to the German Empire, touch frequently upon English law and its development, and have thus sometimes even a nearer and more direct interest for English people than for Germans.

Before proceeding to consider the topics to which the treatises are devoted, it may be remarked that the Editor of the Encyclopaedia starts from the idea that law must be studied not only as a system of rules (dogmatically), but also in its development (historically) and its relation to human nature (philosophically), a division which is familiar to English writers also.

Accordingly the work gives first a Philosophical Introduction (I), secondly the Historical foundations of the law in Germany (II), and lastly the system of the actual law under the headings of Private Law (III) and Public Law (IV).

I. The Introduction is written by Professor Geyer of Munich. After a few introductory remarks the author begins a survey of the history of legal and political philosophy from ancient down to modern times, in pursuance of which he determines his point of view whilst expounding the principles of the philosophy of Herbart,

which in the main he accepts as his own. Many remarks of this treatise will be of interest in this country, where German philosophy is—at the present time—eagerly read; for instance, the statement that Rousseau had in Johannes Althusius a German predecessor. His book on politics, published 1603, is in many points in so exact an accordance with Rousseau's 'Contrat social,' that it is highly probable that the later was indebted to the earlier author. Professor Geyer also takes into account the influence exercised by English writers in the sixteenth and seventeenth centuries. But no allusion whatever is made to the great impetus which the recent writings of English authors have given to political speculation; we think, for instance, that the grand attempt made by Herbert Spencer to apply the theory of evolution to the study of ethical and political problems ought not to have been passed over.

The last part of the Introduction, which is a systematic survey of legal and political philosophy, is not less interesting than the previous portions. The views of the author are sometimes at variance with the leading views which have been adopted in this country. Thus especially the definition of the notion of law will provoke the protests of English readers, at least of those of the Austinian school, for Professor Geyer asserts on one side that the acknowledgment of the people concerned is an essential mark of the notion of law, and on the other he denies that the enforcement of a rule by the political authority is a necessary element of that notion. A rule may be law without such an enforcement.

II. The Introduction, as we have seen, is followed by 'the historical development and the sources of German law.' Germany, like most of the Continental nations, has accepted Roman law together with the Canon law. But as the application of the latter is of comparatively slight importance, it is not unusual to take account of the reception of Roman law only. Although the two bodies of law were received at the same time, the enactments of the Canon law were, as being of a more recent date, preferred to those of the Roman law, and have accordingly sometimes modified the latter as practically applied in Germany. But as the national German law was not entirely abolished by the reception of these foreign laws, we have to distinguish three sources of the law which prevails at the present time in Germany—Roman, Canon, and German law. Accordingly the second section narrates the history of the sources of Roman, Canon, and German law.

(1) The first treatise on the history and sources of Roman law is written by the late Professor Bruns of Berlin. It deserves a special attention, in so far as Bruns, although he made a great many

researches into single topics of Roman law and is well known as one of the greatest authorities upon it, did not publish any comprehensive work upon the subject beyond this and another article in the *Encyclopaedia*. Under these circumstances his survey of the whole history of Roman law will, especially at the present time, where the importance of Roman law is more and more admitted, attract the attention of everybody who takes an interest in the progress of legal studies, the more so as Bruns' manner of writing is so clear as to be perfectly intelligible to any person of education.

The whole essay is naturally divided into six periods, of which periods, 1 to 4, under the headings Kingdom, Republic, Republican Empire, and Absolute Empire, give the history of Roman law up to the end of the reign of the Emperor Justinian, whilst the 5th period (of the Byzantine Empire) and period 6 (of the Roman law in the middle ages) describe briefly its subsequent fortunes in the eastern and western parts of Europe, and enable us thus to understand its actual significance and importance in the modern world.

(2) The second treatise is a very clear statement of the sources of Canon law in the middle ages and the constituent parts of the *Corpus iuris canonici*, in addition to which the relation of ecclesiastical law to the Roman and German (Teutonic) law, and the influence exercised by Canon law upon Private law and the different departments of Public law (i. e. modern international law, constitutional and criminal law, law of procedure, civil as well as criminal), are explained. The whole article is written by Professor Hinschius of Berlin, who is one of the best authorities for the branch which is represented by him in the *Encyclopaedia*.

(3) The reader will be particularly interested in the third article, written by Dr. Brunner, also Professor at Berlin, and well known amongst the learned even in this country, chiefly on account of his researches into the origin of the jury system.

This article on the history of German law and its sources is especially remarkable, as exhibiting a historical faculty rarely met with in any writer upon strictly legal subjects. It is now generally admitted that for a thorough understanding of the actual law it is necessary to know its historical development. But this development can be given in different ways. Commonly we find in treatises on legal history only a bare statement of the successive changes in the law by which a certain institution, for instance ownership, has been gradually developed. These statements are sometimes illustrated by a reference to the facts which have occasioned the change in question, but jurists seldom bring the legal changes into due connection with the life of the nation, or show that the reasons of

them are to be found in the economical and social conditions of the time. Yet no one can doubt that this connection exists, since in nations which present similar social and economical conditions we always find similar legal institutions.

Such an insight is characteristic of Professor Brunner's work, and must meet with the greater sympathy in this country as the history of civilisation, in the sense indicated, has its chief representatives amongst Englishmen. In addition to this, the substance of the article will attract the attention of English readers, for—as is well known—the original sources of English law are essentially Teutonic, so that the bulk of the English common law is of Germanic origin, and is best explained in connection with German law. The tribes commonly though not correctly described by the term Anglo-Saxons, being of Germanic extraction, brought with them to England the legal institutions common to their race. Nevertheless, the subsequent history of these institutions in Germany and the British islands was strikingly different. The law in Germany was not destined to attain complete development, but split up into many hundred special systems prevailing in different parts of the country. The legal wants of the nation as a whole were thus unprovided for, a circumstance which chiefly explained the ready reception of the law of Rome.

In England, on the other hand, the system developed uniformly throughout the whole country. No doubt, the reason of this difference is to be found in the fact that there was no such uniting element in the constitution of the German empire as was found in the administration of justice by the (absolute) Norman kings and the lawyers who served them.

Before the explanation of the earliest legal condition of our German ancestors, Professor Brunner gives a short sketch of their social and economical relations. He considers the economic system known as 'village community' as the essential basis of the legal institutions of the ancient Germans. With the exception of the land for house and yard which belonged to the single families, the land was held in common, and every member was entitled to its use, subject to the rules made by the community itself<sup>1</sup>. In this fact the root of the common liberty and the democratic constitution which existed amongst the Teutonic tribes is to be found. The liberty was one and the same for all the members of the community who were capable of bearing arms, each of them had an equal share in the popular assemblies, in which the sovereignty of the people

<sup>1</sup> [Dr. Grueber does not seem to think that the accepted opinion of which Von Maurer is the chief exponent will be gravely modified, either in Germany or in England, by more recent works which have been supposed to have that effect. Neither do I, as at present advised.—ED.]

was vested, each of them had to take part in administering justice and in defending the community against its enemies. No nobility legally distinguished from the other people existed in those ancient times.

This consideration suggests the doubt whether Sir H. Maine is right in applying the so-called 'Patriarchal Theory' in his 'Ancient Law' to the condition in which German tribes lived at the time of Tacitus. At any rate, by this theory neither the ancient Teutonic constitution nor the constitution of Rome in the earlier time of the Republic (and—very probably—not even in the time of the Kings) is explained.

Under the rules of the Salic Franks (Merovingians and Carolingians) the free polity of the German tribes was more and more decomposed. It is well known that, in consequence of frequent wars, an estate of great landowners was developed by royal grants as early as the time of the Merovingians. Ordinary freemen, being unable to afford the expenses of military duty and being at the same time in want of legal protection, very frequently made themselves by 'commendation' dependents of the greater landlords and the king's vassals. In this way preparation was made for the feudal system which prevailed throughout the middle ages, and of which many traces exist at the present day. It is curious that, together with the general enjoyment of equal rights by freemen, absolute slavery also disappeared. It is sufficiently obvious—as Prof. Brunner explains—that the disappearance of equality was the result of economical changes, but no reason is given by him for the cessation of slavery. Very likely it is to be found in the progressive wants of the community. With the advancing civilization work must be carried to greater perfection. But it is quite impossible that work of a high degree of excellence can be performed by slaves who cannot have any interest in what they produce, which must exclusively belong to their master. Therefore in the higher stages of civilization labour—i. e. the persons who render it—becomes necessarily more emancipated. Accordingly, slavery was first modified into *bondage* (*Colonatus* in the Roman empire), in which the persons concerned, although they were in the main free, were still bound to the land they had to cultivate. Afterwards bondage itself was gradually abolished and exchanged for personal liberty.

(4) The fourth article is also written by Professor Brunner: the survey of the history of French, Norman, and English sources of law. It is necessarily a portion of the *Encyclopædia*, because in our times several French and English institutions have taken root in Germany within the sphere of Constitutional and Criminal



law as well as the law of Procedure. Besides, French law is actually in force in some portions of Germany. Finally, older documents of French and English law show such a near relation to German law that they are a great help in understanding its institutions. The sources of Norman law are explained, because it forms the connecting link between the law of France and that of England.

(5) The article is succeeded by a survey of the Northern Germanic (i. e. Scandinavian) sources of law by Professor Konrad Maurer of Munich, who is allowed to be the highest authority on the subject in Germany, if not also in the Scandinavian kingdoms. The essay is inserted in the Encyclopaedia on account of the close relationship between German and Scandinavian law. Besides, the study of this law is highly interesting as exhibiting an instance of a legal development of a pure Teutonic system, almost undisturbed by the influence of foreign laws. Again, the fact that its most ancient monuments are written in the vernacular renders them more instructive with reference to the nature of archaic German (Teutonic) law than the *leges barbarorum*, which, with a few exceptions, are written in Latin.

These reasons are given by Maurer to justify the insertion of the article into the Encyclopaedia. But there is a further reason why students of English law and antiquities should be interested in the article.

The origin of English law has a certain relation to Scandinavian law, since (to say nothing of the influence of Danish conquests in East Anglia, a subject never yet adequately worked out) the Normans were Scandinavians by origin, and their law undoubtedly retained traces of Scandinavian institutions.

(6) The last article, on modern codifications of Private law in Germany, has no direct relation to England, but it is interesting to see how far the sphere of codification is extended over Germany. Further, considering the fact that there is at the present time a very active discussion in this country whether a codification of English law is to be desired or not, it will be interesting to see that the same discussion was long carried on in Germany, where it led to the well-known literary controversy between Thibaut and Savigny as to the possibility and utility of codification. This question is now answered in the affirmative, and a Civil Code<sup>1</sup> for the whole empire is in course of preparation, in accordance with the general wish of the nation.

III. Thus we have finished the consideration of the historical section of the book, and we now turn to the explanation of the law which is in force at the present time, dealing in the first place with Private law.

<sup>1</sup> Uniform codes of criminal and commercial law have already been in force for a considerable time.

(1) Its main basis is Roman law, not however the Roman law in its original form as expressed in the *Corpus iuris civilis*, but in many parts modified by Canon and German law. On that account this modified Roman law, which usually is termed 'Pandektenrecht,' has been called 'Modern Roman Law' (*Heutiges Römisches Recht*), and this term is adopted in the article which the late Professor C. G. Bruns of Berlin contributed upon this subject to the *Encyclopædia*. All who are acquainted with German legal literature will be grateful to the Editor for having secured the services of so eminent a scholar for the treatment of this, which is perhaps the most important of all departments of law. The expectations raised by the great reputation of the author are fully realised in his article. Bruns displays the most consummate mastery in the treatment of this difficult and extensive subject. Notwithstanding the small measure of space at his disposal, he deals with his subject with so much clearness of thought and elegance of language that he may be read with pleasure by lawyers and laymen alike.

The whole subject is divided into a general and a special part. The former includes the explanation of the Law in general, of Rights and of the Protection of Rights; the latter treats of the following topics: Law of Property, Obligations, Family-law, Law of Guardianship and of Inheritance. Under these headings all the relations of private individuals are regulated by 'Pandektenrecht,' which thus forms a comprehensive and uniform system of law. This was formerly in force all over Germany, but is at the present time superseded in two-thirds of the German Empire by modern codes of private law, which are themselves chiefly founded on Roman law.

(2) Apparently differing from 'Pandektenrecht' in its character is the so-called 'German Private Law' (*Das Deutsche Privatrecht*), the explanation of which is given by Professor Behrend of Greifswald in the second article. It is, however, often co-ordinated (not by the author of the article in question) with 'Pandektenrecht' as forming the other constituent part of the German common law comprehending those legal institutions which are of especially German origin. But it must be remembered that these institutions are, as a rule, very differently regulated in different parts of Germany: for instance, in some parts husband and wife have all their property in common, in other parts there is no community of the kind whatever. But between these two extremes there are several hundred of intermediate forms, of which the books on German private law attempt only to explain the principal types. On the other hand, the Roman law on this subject is only one and the same: the so-called *Dotal-law*. Since the institutions of the German private law exhibit so many varieties of development, it is obvious

that these institutions cannot be regarded as constituting a common law for the whole of Germany, but merely as special systems prevailing in particular districts. But these systems naturally contain common elements, since they all were called into existence by the wants of one and the same nationality. Therefore it is necessary to explain the principles which underlie the different rules prevailing in different districts in order to enable the student to understand the detail of the special systems. Professor Behrend has expressed these principles with a remarkable clearness in a few pages. Thus his article forms a welcome supplement to the article of Bruns, as they together form an introduction to the elements of Private law prevailing in Germany.

(3) Another source of Private law has however been superadded within recent times by the establishment of the German Empire, the legislation of which is empowered to pass laws binding on all German States. The law from this source—as far as it is Private law—is summarised in a third article.

Although the projected civil code for the whole Empire is not yet finished, we are entitled to speak of a civil law of the Empire, not only because many laws issued under the old German confederation and that of North Germany have been adopted by the present Empire, but many laws have also been passed which incidentally affect and modify Private law. It is true that these modifications may be usefully explained in the system of modern Roman and German Private law, it seems however more advisable to treat of them separately, for it is not only interesting to become in this way acquainted with the direction and tendencies of the new Imperial legislation, but the law stated by it differs also in the nature of its operation from the so-called common law in Germany. Whilst the latter had (at least as far as it was Private law) only a subsidiary validity, i.e. it was in force only so far as the particular laws of a given place or country were not opposed to it,—in accordance with the principle '*Stadtrecht bricht Landrecht, Landrecht bricht Gemeines Recht*,'—law made by the new Empire will prevail absolutely, and therefore supersedes every other law—whether common or particular—which is inconsistent with its provisions. In accordance with these views, a special article, although a short one, is devoted to the exposition of the '*Reichs-civilrecht*.' It is written by Professor Mandry of Tübingen, and founded upon his special studies and books upon this topic.

(4, 5, 6) The next article, by Professor Endemann of Bonn, is devoted to three topics which in truth are only portions of Private law, but which for various reasons are treated separately both by scientific writers and in legislation, viz. Mercantile law,

the Law of Merchant Shipping, and the Law of Bills of Exchange. These three topics are at the present time regulated in the main by two Codes (*Das Allgemeine Deutsche Handelsgesetzbuch* and *die Deutsche Wechselordnung*) which were issued in the time of the old German Confederation, but afterwards recognised by the legislation of the present Empire, and thus secured against any interference with their contents on the part of single States.

(7) With this article we should expect the exposition of Private law in Germany to terminate, but the fact that French Civil law is in force in different portions of Germany (the countries on the left bank of the Rhine and in the Grand-duchy of Baden) induces the Editor to insert an article on this topic ('*Das französische Civilrecht*') by Professor Rivier of Brussels. His explanation of the French system of Private law is short and good. Professor Rivier also very properly restricts himself to the exposition of the French law in France, leaving unnoticed the modifications which it has received in other countries.

(8) The last article of the whole section dealing with Private law is an exposition of the so-called International Private law (*Internationales Privatrecht*) by Professor von Bar of Göttingen, who by his researches into this topic is perhaps better qualified for the task than any other jurist in Germany. The name of the topic, '*International Private Law*,' suggests the idea that it is concerned with a Private law which is in force among the different nations, and such an idea is not wholly remote from the speculations of the present day, when proposals are from time to time made for the preparation of codes of different branches of commerce for general adoption by all civilised nations. The real object is, however, not that which its name suggests, but rather that which is suggested by the synonymous expression, *Conflict of Laws*, i.e. the rules of what system are to be applied to the decision of a given case; for instance, if an action was brought in England on a contract made in France, it may be doubted whether the English or the French law is applicable to it. Being thus a body of rules for finding out the rules of the Private law which are to be applied in a certain case, it is in so far a portion of Private law of each country, and is accordingly often explained in systems of Private law (especially the books on the so-called German Private law). But, on the other hand, its rules and principles are of an importance which goes far beyond the Private law of any single nation. The principles settled and still to be settled within the sphere of this topic are universally applicable. They form therefore, if once accepted, in reality International law in the sense of a law which is in force amongst the different nations of the world. In addition to this, in dealing with

this topic reference is frequently made to the principles of the Law of Nations or Public International Law, and this connection of the two topics has induced several authors to deal with them under the general heading of International Law. The peculiarity of our subject being in truth Private law, but of an international character, justifies the Editor fully in making it the subject-matter of a special treatise in his Encyclopaedia, and in putting it at the end of the section on Private law, thus indicating at the same time its relation to the following section on Public law.

IV. Under the heading Public law we find seven treatises.

(1) The first of them is an exposition of Civil procedure, also by Professor von Bar. This subject is concerned with Protection of private rights by the courts, and on that account, as merely *adding* the necessary protection to Private law, it is called *adjective law*. In opposition to this, Private law is described as *substantive*, since it creates rights which exist for their own sake, i. e. the advantages which they confer upon individuals. From this point of view Civil procedure is considered a portion of Private law, a view which was common to former German writers, and to which English lawyers apparently still incline. But the more recent authors on this question lay stress upon the fact that the object of Civil procedure is to determine the form in which the State grants protection to private rights, and on that account it is treated by them as Public law. No doubt, the State has an interest in seeing these forms observed. Therefore the application of the rules of Civil procedure cannot be excluded by private individuals, as is the case with rules of Private law.

Whilst in England the law of procedure since the time of the Conquest was continually developed upon its national basis, the common law of Civil procedure in Germany is based upon a union of German and Roman elements. It was, however, not the pure Roman procedure which was received in Germany in the fifteenth and sixteenth centuries, but the procedure as it was formed and developed upon the Roman basis by the Italian jurists in the middle ages. This mediæval Italian procedure, greatly modified by German theory and practice, forms the so-called common law of procedure which was everywhere in force till the recent promulgation of codes of procedure in several countries of Germany. But all these differences are at present abolished, as, since the 1st of October, 1879, the code of civil procedure has been in force over the whole German Empire.

Professor von Bar, perceiving the peculiar development of this law—to the explanation of which a short historical sketch is devoted—gives a general theory of civil procedure, stating the

leading principles of the common German procedure as well as of foreign legislations, but with the final object of giving a succinct summary of the contents of the new code. In this way an attentive reader obtains not only a clear idea of judicial institutions and functions in general, but especially an abstract of the German judicial legislation.

(2) The next place is taken by an exposition of the ecclesiastical law, written by Professor Hinschius, the author of the article on the sources of Canon law. The position of this topic under the heading of Public Law is quite familiar to English readers who have in their mind the law as to the English Church, which is in fact nothing else than a portion of English Constitutional law and consequently a branch of Public law. It is otherwise on the Continent, where such a union of State and Church does not exist. There the ecclesiastical law as a spiritual law is, especially from the point of view of the Roman Catholic Church, opposed to the secular, municipal law, public as well as private. This opposition was founded upon the theory that the authority of the Church is universal, reaching far beyond the limits of any single State, whereas all secular laws, private and public, are valid only within the single State. In addition to this, it is expressly stated that in the former times the Church had frequently developed its own law quite independently of the State. But according to modern conceptions, sovereignty is denied to the Church. Only the State is sovereign, and is entitled to rule all the relations of its members. Consequently, if there are one or several Church-societies within its territory, they have only the position of corporations. The law of the single Church is accordingly merely a portion of the law of the State or the law recognised by the State. Since these latter views are shared by the Editor of the *Encyclopædia* and the Author of the article, its position in the department of Public law is explained.

After having discussed this question, the Author sets forth the principles of the Roman Catholic Church, considering its organisation, the rights of the Church as well as of its members; then he proceeds to the explanation of the law of the evangelical Churches, comprehending the followers of Luther and the adherents of the reformed confession; whilst a short appendix treats of the Church-societies which belong to neither of the three legally recognised confessions. Although they are entitled to conduct religious worship, and every difference in the legal condition of men which was derived from differences of their religious confession is abolished, the rights of corporations have been frequently denied to the new societies, and are made dependent on a grant by a special statute.

(3) The third article, on Criminal Law, is written by Professor Geyer, who is already known to us as the author of the philosophical Introduction to the whole work. As might be expected, his remarks on the theory of punishment, i.e. the question whether punishment is to be inflicted for its own sake (absolute theory of punishment—*punitur quia peccatum est*) or for the purposes of general expediency (relative theory of punishment—reformation, prevention), are in accordance with the leading philosophical ideas of the Introduction. This exposition is followed by a very interesting survey of the history of Criminal law, at the end of which the origin of the new Criminal Code—in force from the 1st of January, 1872, all over Germany—is mentioned, and the present state of criminal legislation in the other countries of the civilised world is determined. Professor Geyer next proceeds to divide his whole topic into a general and a special part. The former comprehends first the theory of crime in general, secondly the theory of the different means of punishment, and thirdly the application of penal laws to crimes committed. The special part consists of an explanation of the single crimes and offences and their punishment, but here the author restricts himself to giving the main divisions of crimes and their most general characteristics, reserving fuller discussion for the Alphabetic part of the Encyclopaedia.

(4) The exposition of the Criminal law is naturally followed by that of Criminal procedure. This article deserves the special attention of English readers, because the principles of English Criminal procedure have been to a certain extent imported into the Criminal procedure of Germany. The peculiarity of an English prosecution is, that not only an accusation is necessary, but also in the process itself the prosecutor and accused are opposed one to another as two parties, in essentially the same way as plaintiff and defendant in a civil action. Accordingly, it is for each party—without the assistance of the Court—to provide evidence in support of his own case, the prosecutor to establish the guilt of the accused and the accused to establish his own innocence.

The older German Criminal procedure was essentially the same. But this was superseded to a great extent by the *Constitutio Criminalis Carolina* (a code of Criminal law and procedure issued 1532), and disappeared totally during the seventeenth and eighteenth centuries, giving place to the so-called Inquisitorial procedure. The essential feature of the latter system is that the judge has to enquire into the circumstances of the case, or, in other words, has to collect the evidence himself, in order to form his opinion upon the case. Accordingly, there are no parties in a criminal trial; neither a

prosecutor (accusator) nor, strictly speaking, a defendant; only a person who, for some reason, is under suspicion of having committed a crime, but he is merely an object of the inquiry for the judge and a source of information as is a document or a disinterested witness. Such was in the main the aspect of the Criminal procedure which was in force throughout Germany. Under this system the whole evidence was reduced to writing and taken in secret.

In the present century a reform of this procedure was attempted in the direction of the English method. There was a popular cry for a *public* and *oral prosecution* in the presence of a *jury*. And, in point of fact, since 1848 in most of the German States a reform in this sense has been introduced; but the immediate model for the new codes was not the English but the French procedure, which is in truth rather an inquisitorial process with accusatory forms, than a really accusatory process like the English. Upon the basis of these reforms the Code of Criminal Procedure for the new German Empire was elaborated. It was published on the 1st of February, 1877, and came into force for the whole Empire on the 1st of October, 1879. No doubt, the forms which it prescribes are taken from the accusatory system; but substantially the proceedings are still very largely influenced by the old inquisitorial theory. The legislator was prevented from adopting more fully the accusatory system by a doubt whether it might not throw difficulties in the way of arriving at the truth. Similar views are at the present time entertained by English lawyers and politicians, who seem inclined to take some steps in the direction of the inquisitorial system, such as to permit the interrogation of the accused person.

(5) The fifth article of our series, on the 'German Constitutional Law,' is due to the pen of the Editor himself, Professor von Holtzendorff. As the title indicates, it is intended by him to make the reader acquainted with the constitution of the German Empire and its peculiar relations to the constitutions of the different States in Germany. But the author's work is laid on such a broad foundation, and shows such a familiar knowledge of the various forms which political constitutions may assume, that even those who are not specially interested in German matters cannot fail to have their attention roused and their knowledge increased by the perusal of the article. This will be specially the case with the English reader, who will find it particularly instructive to compare the constitution of England with that of Germany as elucidated by Professor von Holtzendorff, and who will have the gratification of finding how highly the English constitution is valued by so competent a judge.



(6) No less interesting than Professor von Holtzendorff's article is the one following it, written by Professor Ernst Meier of Halle, on the subject of 'Administrative Law.' 'Administrative Law' is often distinguished from 'Constitutional Law;' it being held that the province of the latter includes the determination of the form of government and the definitions of the various organs of the sovereign power, whilst the former is understood as directing the various functions of these organs. Professor Meier, however, uses the word 'administration' as opposed to 'legislation.' According to him all political activity consists either in the establishment of abstract rules for human conduct—legislation; or dispositions which only take effect in concrete cases—administration. But this distinction, as the author points out, is merely of theoretical importance; in practice, the functions of the legislative and executive powers in a State are not separated in the same manner, for in all countries the organs of legislation have administrative functions (e.g. the Private Bill legislation of the British Parliament), and, conversely, acts, which, strictly speaking, are of a legislative character, proceed from administrative or executive organs (e.g. the bye-laws of municipal corporations). The field for administrative work is naturally co-extensive with the whole range of political activity, and the difference between the various systems of administration do not so much concern the objects to which they are applied as the manner in which they are carried out. Thus administration may be centralised or subdivided; hence the division between government administration and communal administration, which forms the subject of one of the author's chapters, whilst another chapter, dealing with the distinction with purely official administration and administration by (elected) representatives belonging to the locality concerned, speaks of the State administration as opposed to self-government.

After these general explanations the author proceeds to give an account of the administrative organisation in Prussia, England, and France. The comparison between the systems of administration in the two latter countries is highly interesting, as they stand in marked contrast to each other: whilst in France everything depends on and is connected with the central authority, and the administration, whether relating to the whole country or to a 'department,' an 'arrondissement,' a 'canton,' or a 'commune,' is always essentially a State administration, in England a multitude of independent local authorities exercise numerous administrative functions without any government interference. The author, whilst duly appreciating the value of a system giving to local organisations a life and development of their own, finds many unsatisfactory features

in the condition of local government as it exists at present in England, his chief point of complaint being the want of an intermediate link between the central and the communal government. He advocates the establishment of county-boards as the only means capable of stemming the advance of centralisation which must otherwise take place.

The last part of the article examining the relations of Justice and Administration (in the narrower sense) is specially interesting in its first subdivision, which deals with the present state of the so-called 'Administrative Jurisdiction,' and begins with a detailed statement of the law regulating these matters in England, followed by an explanation of the systems in Italy, France, and the principal German States.

Looking at the whole of Professor Meier's article, we find that in a comparatively small compass it gives a pretty complete idea of administrative law, and that it proves a very extensive knowledge of the public law of the chief civilised nations, based, as regards many points, on the original research of the author. Though its main object is a description of the Prussian system of administration and the great reforms which are taking place in that country, it contains sufficient information as to the peculiarities of administration in other countries. The study of the Prussian reforms may perhaps be of special interest to English readers, as they are in a great measure due to the literary and political activity of Professor Gneist, who was largely influenced by his careful and extensive researches into English political and local government. In the same manner the shortcomings of English administrative law may possibly be remedied on the basis of a comparative study of the continental systems, and especially of the Prussian reform, which, whilst it attempts to grant a large measure of self-government to communal bodies and to groups of communal bodies (as a rule through the agency of their elected representatives), and whilst it delegates to them a portion of the functions of the central government, yet endeavours not to loosen the connection of the 'commune' with the State, and not to endanger the interest of the whole community in favour of the supposed benefit of the units of which it consists.

(7) The last article treats of the 'European Law of Nations' (Das Europäische Völkerrecht), which corresponds with what is called 'Public International Law' in this country, and which deals with the mutual relations of independent states. It has found a most worthy interpreter in the Editor of the Encyclopaedia, who by the versatility of his abilities and by the universality of his knowledge, no less than by his thorough acquaintance with

the affairs of other nations, is prominent among German scholars. That this reputation is well deserved will be evident even to a superficial reader of the article, which displays a most extensive acquaintance with foreign literature.

The *Encyclopädie* contains in its four principal parts and twenty-two articles a wealth of material which is not commonly found in a single volume. To add however to this abundance, there is an Appendix consisting of two essays which English readers will appreciate as much as the rest of the book.

The first of them, written by Professor H. Schulze of Heidelberg, deals with 'the law referring to the princely families of Germany, in its historical development as well as in its present significance' (*Das Deutsche Fürstenrecht in seiner geschichtlichen Entwicklung und gegenwärtigen Bedeutung*). It is well known that as regards many points—such as the devolution of property, the conclusion of marriage, the capacity of infants, etc.—the princely houses of Germany are governed by other rules than those commonly applicable. The body of these rules has been called hitherto 'Private law relating to princely houses' (*Privatfürstenrecht*), but this expression is rightly rejected by the author, as it appears particularly inappropriate in a time when the separation of Public from Private law is so much insisted on, and the more general expression '*Fürstenrecht*' is substituted for it.

The last article, though not the least in importance, is written by Professor Gneist, on 'the Development of the English Parliamentary Constitution' (*Die Entwicklung der Englischen Parlamentsverfassung*). The insertion of this article into the Appendix is a welcome addition to the contents of the work, for the English constitution has in all civilised countries attracted a considerable amount of attention, and being looked upon as a sort of ideal to be copied, has exercised a very great influence upon public law on the Continent, and especially in Germany. It is therefore particularly fortunate that the services of a man like Professor Gneist, equally distinguished as politician, jurist and historian, have been secured to explain the principles of the English parliamentary system, and Englishmen who are acquainted with the great value of his researches respecting the political and social institutions of this country, will be especially inclined to appreciate the article, which—in a space of about eighty-seven pages—contains an accurate and compressive account of the whole historical development of their own constitutional law<sup>1</sup>.

<sup>1</sup> The article gives in outline the contents of the detailed work of the same author which has recently been published [*Gneist, Englische Verfassungsgeschichte*, Berlin, 1882].

We have thus attempted to give an abstract of the contents of the 1375 pages of the first volume of the *Encyclopaedia*, the practical advantages of which are increased by a well-arranged and copious Index. There have not been wanting critics who have denied the utility of the work by maintaining that it will not serve the purposes of the student, the contents being rather above his comprehension, and that the advanced scholar will not derive much benefit from it, as he would require a more detailed account. It seems to us, on the contrary, that the book will be very useful to the student, at least the diligent and capable student, who will find in it a most instructive and suggestive conspectus of all the branches of the subject which he has to prepare for examination purposes and the knowledge of which is necessary for his professional career; and further, that the scholar will find the book most useful and convenient, not merely because some particular topic which forms the subject of his researches is discussed by a special authority upon it, but also for the more important reason that a certain breadth of knowledge is indispensable in our days, and that a successful study of one particular subject is only possible to those who clearly understand its connection with the whole scheme of the science of which it forms a part. The jurist for instance whose labours are devoted to any branch of private law, will have to take into account the influence of public law on his subject, and no better method can be devised for the illustration and elucidation of a rule of law prevailing in one country than a consideration of the development of the corresponding rules in the legal systems of other nations. The work under review will be found most useful for these purposes, giving either the required information at once, or enabling the reader by sufficient references to other authorities to find fuller materials for his researches. But the value of the book is not confined to those persons who are professionally interested in law; it will be a very useful guide even for educated laymen who are desirous of some comprehensive information on legal matters the importance of which is more and more admitted in our days. These considerations explain the great success which the Editor's labours have met with—a success which may be measured by the fact that the present edition is the fourth since the original publication of the work in 1870. We have no hesitation in saying that this success will continue and still increase in future.

ERWIN GRUEBER.

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FEDERAL GOVERNMENT<sup>1</sup>.

**T**HERE exists a widespread belief that the solution of problems which perplex English statesmanship is to be found in some system of federal government. Federalism (it is hoped) will reconcile Irish desires for national independence with the determination of Englishmen to maintain the integrity of the United Kingdom, will convert groups of isolated and therefore weak dependencies into united and therefore vigorous nations, and will above all bring the colonies of Great Britain into a new, a close, and a friendly connection with the mother country, and thus double the power, secure the permanence, and promote the expansion of the Empire. Whether the faith of the present generation of Englishmen in the virtues of federalism be or be not well founded, one matter is past dispute—the new faith in federalism is faith without knowledge. Popular imagination is impressed by the success and prosperity of the United States, of Switzerland, and of the Canadian Dominion. But few even among educated Englishmen know the main articles of, say, the American or the Swiss Constitution. Fewer still understand the essential nature of federalism, or are aware that federal government as it exists in the United States is a polity of a peculiar character, which can come into existence only under special conditions, which aims at the attainment of definite ends, and which attains these objects by the use of definite means deliberately adopted by the founders of the constitution. Modern federalism is indeed little short of a discovery or invention in the art of constitutional architecture, and may be looked upon as a curious and complicated piece of legal mechanism. My aim in this article is to examine this ‘machine,’ which is the invention of legists, from a lawyer’s point of view, to note both the aim for which it is created and the means by which this aim is attained, and from such an examination to deduce certain conclusions of more or less general importance.

A federal state requires for its formation two conditions.

There must exist, in the first place, a body of countries such as the cantons of Switzerland, the colonies of America, or the provinces of Canada, so closely connected by locality, by history, by

<sup>1</sup> Commentaries on the Constitution of the United States. Joseph Story, LL.D.: 4th edition.—Parliamentary Procedure and Practice in the Dominion of Canada. By J. G. Bourinot.—Eidgenössische Bundesverfassung, Bundesgesetze und Bundesbeschlüsse von allgemeinem Interesse.—Das öffentliche Recht der Schweizerischen Eidgenossenschaft. Dr. J. Dubs. Zurich, Crell, Fusoli & Co., 1878.

race, or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality. It will, further, be generally found (if we appeal to experience) that lands which now form part of a federal state were at some stage of their existence bound together by close alliance or by subjection to a common sovereign. It were going further than facts warrant to assert that this earlier connection is essential to the formation of a federal state. But it is certain that where federalism flourishes it is in general the slowly-matured fruit of some earlier and looser connection.

A second condition absolutely essential to the founding of a federal system is the existence of a very peculiar state of sentiment among the inhabitants of the countries which it is proposed to unite. They must desire union, and must not desire unity. If there be no desire to unite, there is clearly no basis for federalism; the wild scheme entertained (it is said) under the Commonwealth of forming a union between the English Republic and the United Provinces was one of those dreams which may haunt the imagination of politicians but can never be transformed into fact. If, on the other hand, there be a desire for unity, the wish will naturally find its satisfaction, not under a federal but under a 'unitarian' constitution; the experience of England and Scotland in the eighteenth and of the States of Italy in the nineteenth century shows that common national feeling or the sense of common interests may be too strong to allow of that combination of union and separation which is the foundation of federalism. The phase of sentiment, in short, which forms a necessary condition for the formation of a federal state is that the people of the proposed state should wish to form for many purposes a single nation, yet should not wish to surrender the individual existence of each man's state or canton. We may perhaps go a little further, and say that a federal government will hardly be formed unless many of the inhabitants of the separate states feel stronger allegiance to their own state than to the common government. This was certainly the case in America towards the end of the last century and in Switzerland at the middle of the present century. In 1787 a Virginian or a citizen of Massachusetts felt more attachment to Virginia or to Massachusetts than to the body of the confederated states. In 1848 the citizens of Lucerne felt far keener loyalty to their canton than to the confederacy, and the same thing no doubt held true in a less degree of the men of Berne or of Zurich. The sentiment therefore which creates a federal state is the prevalence throughout the citizens of more or less allied countries of two feelings which are to a certain extent inconsistent—the desire for

national unity and the determination to maintain the independence of each man's separate state. The aim of federalism is to give effect as far as possible to both these sentiments.

A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of 'state rights.' The end aimed at fixes the essential character of federalism. For the means by which federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states. The details of this division vary under every different federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several states. The preamble to the Constitution of the United States recites that 'We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' The tenth Amendment enacts that 'the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.' These two statements, which are reproduced with slight alteration in the constitution of the Swiss Confederation<sup>1</sup>, point out the aim and lay down the fundamental idea of federalism. From this notion, namely that national unity can be reconciled with state independence by a division of powers under a common constitution between the nation on the one hand and the individual states on the other, flow the three leading characteristics of federalism,—the supremacy of the constitution—the distribution among bodies with limited and co-ordinate authority of the different powers of government—the authority of the law courts to act as interpreters of the constitution.

*The Supremacy of the Constitution.*—A federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence every power, executive, legislative, or judicial, whether it belong to the nation or to the individual states, is subordinate to and controlled by the constitution. Neither the President of the United States nor the Houses of Congress, nor the Governor of Massachusetts nor the

<sup>1</sup> Bundesverfassung, Preamble, and Art. 3.

Assembly of Massachusetts can legally exercise a single power which is inconsistent with the articles of the Constitution. This doctrine of the supremacy of the Constitution is familiar to every American, but in England even trained lawyers find a difficulty in following it out to its legitimate consequences. The difficulty arises from the fact that under the English constitution no principle is recognised which bears any real resemblance to the doctrine (essential to federalism) that the constitution constitutes the 'supreme law of the land'.<sup>1</sup> In England we have laws which may be called fundamental or constitutional because they deal with important principles (as, for example, the descent of the Crown or the terms of union with Scotland) lying at the basis of our institutions, but with us there is no such thing as a supreme law, or law which tests the validity of other laws. There are indeed important statutes, such as the Act embodying the treaty of union with Scotland, with which it would be political madness to tamper gratuitously; there are utterly unimportant statutes, such for example as the Dentists' Act, 1878, which may be repealed or modified at the pleasure or caprice of Parliament; but neither the Act of Union with Scotland nor the Dentists' Act, 1878, has more claim than the other to be considered a supreme law. Each embodies the will of the sovereign legislative power; each can be legally altered or repealed by Parliament, neither tests the validity of the other. Should the Dentists' Act, 1878, unfortunately contravene the terms of the Act of Union, the Act of Union would be *pro tanto* repealed, but no judge would dream of maintaining that the Dentists' Act, 1878, was thereby rendered invalid or unconstitutional. The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the king in Parliament. But this dogma is incompatible with the existence of a fundamental compact the provisions of which control every authority existing under the constitution<sup>2</sup>.

In the supremacy of the constitution are involved three consequences:—

The constitution must be what is called a written constitution.

The constitution must be what, for want of a better term, may be called an 'inflexible' or 'inexpansive' constitution.

The law of the constitution must be either legally immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the constitution.

In spite of the doctrine enunciated by some jurists that in every

<sup>1</sup> See U. S. Constitution, art. 6. cl. 2.

<sup>2</sup> Compare especially 1 Kent, 447-449.



country there must be found some person or body legally capable of changing every institution thereof, it is hard to see why it should be held inconceivable that the founders of a polity should have deliberately omitted to provide any means for lawfully changing its bases. Such an omission would not be unnatural on the part of the authors of a federal union, since one main object of the states entering into the compact is to prevent further encroachments upon their several state rights; and in the fifth article of the United States Constitution may still be read the record of an attempt to give to some of its provisions temporary immutability. The question however whether a federal constitution necessarily involves the existence of some ultimate sovereign power authorised to amend or alter its terms is of merely speculative interest, for under existing federal governments the constitution will be found to provide the means for its own improvement. It is however certain that this supreme legislative power cannot in a confederacy be vested in any ordinary legislature acting under the constitution. For so to vest legislative sovereignty would be inconsistent with the aim of federalism, namely, the permanent division between the spheres of the national government and of the several states. If Congress could change the constitution, New York and Massachusetts would have no legal guarantee for the amount of independence reserved to them under the constitution, and would be as subject to the sovereign power of Congress as is Scotland to the sovereignty of Parliament; the Union would cease to be a federal state, and would become a unitarian republic. If, on the other hand, the legislature of South Carolina could of its own will amend the constitution, the authority of the central government would (from a legal point of view) be illusory; the United States would sink from a nation into a collection of independent countries united by the bond of a more or less permanent alliance. Hence the power of amending the constitution has been placed, so to speak, outside the constitution, and one may say, with sufficient accuracy for our present purpose, that the legal sovereignty of the United States resides in the majority of a body constituted by the joint action of three-fourths of the several states at any time belonging to the Union<sup>1</sup>. Now from the necessity for placing ultimate legislative authority in some body outside the constitution a remarkable consequence ensues. Under a federal as under a unitarian system there exists a sovereign power, but the sovereign is in a federal state a despot hard to rouse. He is not, like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been

<sup>1</sup> See Constitution of U. S., art. 5.

roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.

Every legislative assembly existing under a federal constitution is merely a subordinate law-making body, whose laws are of the nature of bye-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority.

There is an apparent absurdity in comparing the legislature of the United States to an English railway company or a school-board, but the comparison is just. Congress can, within the limits of its legal powers, pass laws which bind every man throughout the United States. The Chatham and Dover Railway can, in like manner, pass laws which bind every man throughout the British dominions. A law passed by Congress which is in excess of its legal powers, as contravening the constitution is invalid; a law passed by the London, Chatham, and Dover Railway in excess of the powers given by Act of Parliament, or, in other words, by the legal constitution of the company, is also invalid; a law passed by Congress is called an 'act' of Congress, and if *ultra vires* is described as 'unconstitutional;' a law passed by the London, Chatham, and Dover Railway is called a 'bye-law,' and if *ultra vires* is called, not 'unconstitutional,' but 'invalid.' Differences however of words must not conceal from us essential similarity in things. Acts of Congress, or of the Legislative Assembly of New York or of Massachusetts, are at bottom simply 'bye-laws,' depending for their validity upon their being within the powers given to Congress or to the state legislatures by the constitution. The bye-laws of the London, Chatham, and Dover Railway, imposing fines upon passengers who travel over their line without a ticket, are laws, but they are laws depending for their validity upon their being within the powers conferred upon the company by Act of Parliament, i. e. by the company's constitution. Congress and the London, Chatham, and Dover Railway are in truth each of them nothing more than subordinate law-making bodies. Their power differs not in degree, but in kind, from the authority of the sovereign Parliament of the United Kingdom.

*The Distribution of Powers.*—The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the

national government and the separate states. The powers given to the nation form in effect so many limitations upon the authority of the separate states, and as it is not intended that the central government should have the opportunity of encroaching upon the rights retained by the states, its sphere of action necessarily becomes the object of rigorous definition. The Constitution, for instance, of the United States delegates special and closely-defined powers to the executive, to the legislature, and to the judiciary of the Union, or in effect to the Union itself, whilst it provides that the powers 'not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people<sup>1</sup>.' This is all the amount of division which is essential to a federal constitution. But the principle of definition and limitation of powers harmonises so well with the federal spirit that it is generally carried much farther than is dictated by the mere logic of the Constitution. Thus the authority assigned to the United States under the Constitution is not concentrated in any single official or body of officials. The President has definite rights, upon which neither Congress nor the judicial department can encroach. Congress has a limited (indeed a very limited) power of legislation, for it can make laws upon eighteen topics only; but within its own sphere it is independent both of the President and of the Federal Courts. So, lastly, the 'Judiciary' have their own powers. They stand on a level both with the President and with Congress, and their authority (being directly derived from the Constitution) cannot, without a distinct violation of law, be trenched upon either by the executive or by the legislature. Where, further, states are federally united, certain principles of policy or of justice must be enforced upon the whole confederated body as well as upon the separate parts thereof, and the very inflexibility of the constitution tempts legislators to place among constitutional articles maxims which (though not in their nature constitutional) have special claims upon respect and observance. Hence spring additional restrictions on the power both of the federation and of the separate states. The United States Constitution prohibits both to Congress<sup>2</sup> and to the separate States<sup>3</sup> the passing of a bill of attainder or an *ex post facto* law, the granting of any title of nobility, or the laying of any tax on articles exported from any state<sup>2</sup>, enjoins that full faith shall be given to the public acts and judicial proceedings of every other State, hinders any

<sup>1</sup> Constitution of U. S., Amendment, art. 8. Compare provisions of a similar character in the Swiss Constitution, Bundesverfassung, arts. 3-70, 71-94, 95-104, 105-114, and in the Constitution of the Canadian Dominion, B. N. America Act, 1867, sects. 91, 92.

<sup>2</sup> U. S. Constitution, sect. 9.

<sup>3</sup> *Ib.* 10.

State from passing any law impairing the obligation of contracts<sup>1</sup>, and prevents every State from entering into any treaty, alliance, or confederation; thus it provides that the elementary principles of justice, freedom of trade, and the rights of individual property shall be absolutely respected throughout the length and breadth of the Union. It also ensures that the right of the people to keep and bear arms shall not be infringed, while it also provides that no member can be expelled from either House of Congress without the concurrence of two-thirds of the House. Other federal constitutions go far beyond that of the United States in inscribing among constitutional articles either principles or petty rules which are supposed to have a claim to legal sanctity; the Swiss constitution teems with 'guaranteed' rights. Nothing, however, affords so striking an example of the connection between federalism and the 'limitation of powers' as the way in which the principles of the federal constitution pervade in America the constitutions of the separate States. In no case does the legislature of any one State possess all the powers of 'state sovereignty' left to the States by the constitution of the republic, and every State legislature is subordinated to the Constitution of the State. The ordinary legislature of New York or Massachusetts can no more change the State Constitution than it can alter the Constitution of the United States itself; and, though the topic cannot be worked out here in detail, it may safely be asserted that state government throughout the Union is grounded upon the federal model, and (what is noteworthy) that state constitutions have carried much further than the constitution of the republic the tendency to clothe with constitutional immutability any rules which strike the people as important. Illinois has embodied regulations as to elevators among what the French call fundamental laws<sup>2</sup>. The tendency of federalism to limit on every side the action of government and to split up the strength of the state among co-ordinate and independent authorities is specially noticeable, because it forms the essential distinction between a federal system such as that of America or Switzerland and (to borrow a convenient expression from foreign writers) a 'unitarian' system of government such as that which exists in England or Russia. We talk indeed of the English constitution as resting on a balance of powers, and as maintaining a division between the executive, the legislative, and the judicial bodies. These expressions have a real meaning. But they have quite a different significance as applied to England from the sense which they bear as applied to the United States. All the

<sup>1</sup> U. S. Constitution, sect. 10. cl. 1.

<sup>2</sup> See *Munn v. Illinois*, 4 Otto, 113.

power of the English state is concentrated in the imperial Parliament, and all departments of government are legally subject to Parliamentary despotism. Our judges are independent, in the sense of holding their office by a permanent tenure and of being raised above the direct influence of the Crown or the Ministry; but the judicial department does not pretend to stand on a level with Parliament; its functions might be modified at any time by an Act of Parliament; and such a statute would be no violation of the law. The Federal Judiciary, on the other hand, are co-ordinate with the President and with Congress, and cannot without a revolution be deprived of a single right by President or Congress. So, again, the executive and the legislature are with us distinct bodies, but they are not distinct in the sense in which the President is distinct from and independent of the Houses of Congress. The House of Commons interferes with administrative matters, and the Ministry are in truth placed and kept in office by the House. A modern Cabinet would not hold power for a week if censured by a newly-elected House of Commons. An American President may retain his post and exercise his very important functions even though his bitterest opponents command majorities both in the Senate and in the House of Representatives. Unitarianism, in short, means the concentration of the strength of the state in the hands of one visible sovereign power, be that power Parliament or Czar. Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.

*The Authority of the Law Courts.*—Whenever there exists, as in Belgium or in France, an inflexible constitution the articles of which cannot be amended by the ordinary legislature, the difficulty has to be met of guarding against legislation inconsistent with the constitution. As Belgian or French statesmen have created no machinery for the attainment of this object, we may conclude that they considered respect for the constitution to be sufficiently secured by moral or political sanctions, and treated the limitations placed on the power of Parliament rather as maxims of policy than as true laws. During a period, at any rate of more than fifty years, no Belgian judge has (it is said) ever pronounced a Parliamentary enactment unconstitutional. No French tribunal would hold itself at liberty to disregard an enactment, however unconstitutional, passed by the National Assembly, inserted in the *Bulletin des Lois*, and supported by the force of the Government; and French statesmen may well have thought, as De Tocqueville certainly did think, that in France possible Parliamentary invasions of the constitution were a less evil than the participation of the judges

in political conflicts. France in short and Belgium being governed by unitarian constitutions, the non-sovereign character of the legislature is in each case an accident, not an essential property of their polity. Under a federal system it is otherwise. The legal supremacy of the constitution is essential to the existence of the state; the glory of the founders of the United States is to have devised or adopted arrangements under which the constitution became in reality as well as name the supreme law of the land. This end they attained by adherence to a very obvious principle, and by the invention of appropriate machinery for carrying this principle into effect.

The principle is clearly expressed in the Constitution itself. 'The Constitution,' runs article six, 'and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding<sup>1</sup>.' The import of these expressions is unmistakeable. 'Every Act of Congress,' writes Chancellor Kent, 'and every Act of the legislatures of the State, and every part of the Constitution of any State, which are repugnant to the Constitution of the United States, are necessarily void. This is a clear and settled principle of [our] constitutional jurisprudence<sup>2</sup>.' The legal duty therefore of every judge, whether he act as a judge of the State of New York or as a judge of the Supreme Court of the United States, is clear. He is bound to treat as void every legislative act, whether proceeding from Congress or from the State legislatures, which is inconsistent with the Constitution of the United States. His duty is as clear as that of an English judge called upon to determine the validity of a bye-law made by the London, Chatham, and Dover Railway Company. The American judge must in giving judgment obey the terms of the Constitution, just as his English brother must in giving judgment obey every Act of Parliament bearing on the case. To have laid down the principle clearly is much, but the great problem was how to ensure that the principle should be obeyed; for there clearly existed a danger that Judges depending on the federal government should wrest the Constitution in favour of the central power, and that judges created by the States should wrest it in favour of State rights or interests. This problem has been solved by the creation of the Supreme Court and of the federal judiciary. Of the nature and position of the Supreme Court itself thus much alone need for our present purpose be noted. The Court derives its existence from the Constitution, and

<sup>1</sup> U. S. Constitution, art. 6.

<sup>2</sup> Kent, p. 314, and conf. *Ibid.* p. 449.

stands therefore on an equality with the President and with Congress; the members thereof (in common with every judge of the federal judiciary) hold their places during good behaviour, at salaries which cannot be diminished during a judge's tenure of office<sup>1</sup>. The Supreme Court stands at the head of the whole federal judicial department, which extending by its subordinate courts throughout the Union can execute its judgments through its own officers without requiring the aid of State officials. The Supreme Court, though it has a certain amount of original jurisdiction, derives its importance from its appellate character; it is on every matter which concerns the interpretation of the Constitution a supreme and final court of appeal from the decision of every court (whether a federal court or a state court) throughout the Union. It is in fact the final interpreter of the Constitution, and therefore has authority to pronounce finally as a court of appeal whether a law passed either by Congress or by the legislature of a State, e.g. New York, is or is not constitutional. To understand the position of the Supreme Court we must bear in mind that there exist throughout the Union two classes of courts in which proceedings can be commenced, namely the subordinate federal courts deriving their authority from the Constitution, and the State courts, e.g. of New York or Massachusetts, created by and existing under the State Constitutions; and that the jurisdiction of the federal judiciary and the State judiciary is in many cases concurrent, for though the jurisdiction of the federal courts is mainly confined to cases arising under the Constitution and laws of the United States, it is also occasionally dependent upon the character of the parties, and though there are cases with which no State court can deal, such a court may often entertain cases which might be brought in a federal court, and constantly has to consider the effect of the Constitution on the validity either of a law passed by Congress or of State legislation. That the Supreme Court should be a court of appeal from the decision of the subordinate federal tribunals is a matter which excites no surprise. The point to be noted is that it is also a court of appeal from decisions of the Supreme Court of any State, e.g. New York, which turn upon or interpret the articles of the Constitution or acts of Congress. The particular cases in which a party aggrieved by the decision of a State court has a right of appeal to the Supreme Court of the United States are regulated by an Act of Congress of 24th September, 1789, the twenty-fifth section of which provides that 'a final judgment or decree, in any suit in the highest court of law or equity of a State, may be brought up on error in

<sup>1</sup> See U. S. Constitution, art. 3. sects. 1, 2.

point of law, to the Supreme Court of the United States, provided the validity of a treaty, or statute of, or authority exercised under the United States, was drawn in question in the State court, and the decision was against that validity; or provided the validity of any State authority was drawn in question, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favour of its validity; or provided the construction of any clause of the Constitution or of a treaty, or of a statute of or commission held under the United States was drawn in question and the decision was against the title, right, privilege, or exemption, specially claimed under the authority of the Union<sup>1</sup>. Strip this enactment of its technicalities and it comes to this. A party to a case in the highest court, say of New York, who bases his claim or defence upon an article in the Constitution or law made under it, stands in this position; if judgment be in his favour there is no further appeal; if judgment goes against him, he has a right of appeal to the Supreme Court of the United States. Any lawyer can see at a glance how well devised is the arrangement to encourage State courts in the performance of their duty as guardians of the Constitution, and further that the Supreme Court thereby becomes the ultimate arbiter of all matters affecting the Constitution. Let no one for a moment fancy that the right of every court, and ultimately of the Supreme Court, to pronounce on the constitutionality of legislation and on the rights possessed by different authorities under the Constitution is one rarely exercised, for it is in fact a right which is constantly exerted without exciting any more surprise on the part of the citizens of the Union than does in England a judgment of the Queen's Bench Division treating as invalid the bye-law of a railway company. The American tribunals have dealt with matters of supreme consequence; they have determined that Congress has the right to give priority to debts due to the United States<sup>2</sup>, can lawfully incorporate a bank<sup>3</sup>, has a general power to levy or collect taxes without any restraint, but subject to definite principles of uniformity prescribed by the Constitution; the tribunals have settled what is the power of Congress over the militia, who is the person who has a right to command it<sup>4</sup>, and that the power exercised by Congress during the War of Secession of issuing paper money was valid<sup>5</sup>. The courts again have controlled the power of the separate States fully as vigorously as they have defined the authority of the United

<sup>1</sup> 1 Kent, p. 300.

<sup>2</sup> *Ib.* pp. 244-248.

<sup>3</sup> *Ib.* pp. 248-254.

<sup>4</sup> *Ib.* pp. 262-266.

<sup>5</sup> 2 Story, Const., sects. 1016, 1017. See *Hepburn v. Griswold*, 8 Wallace, 603, Dec. 1869, and *Knox v. Lee*, 12 Wallace, 457.



States. The judiciary have pronounced unconstitutional every *ex post facto* law, every law taxing even in the slightest degree articles exported from any State, and have again deprived of effect State laws impairing the obligation of contracts. To the judiciary in short is due the maintenance of justice, the existence of internal free trade, and the general respect for the rights of property; whilst a recent decision shows that the courts are prepared to uphold as consistent with the Constitution any laws which prohibit modes of using private property which seem to the judges inconsistent with public interest<sup>1</sup>. The power moreover of the law courts which maintains the articles of the Constitution as the law of the land, and thereby keeps each authority within its proper sphere, is exerted with an ease and regularity which has astounded and perplexed continental critics. The explanation is that the judges of the United States control the action of the Constitution, but they perform purely judicial functions, since they never decide anything but the cases before them. It is natural to say that the Supreme Court pronounces Acts of Congress invalid, but in fact this is not so. The court never pronounces any opinion whatever upon an Act of Congress. What the court does do is simply to determine that in a given case *A* is or is not entitled to recover judgment against *X*; but in determining that case the court may decide that an Act of Congress is not to be taken into account, since it is an Act beyond the constitutional powers of Congress. If any one thinks this is a distinction without a difference he shows great ignorance of politics, and does not understand how much the authority of a court is increased by confining its action to purely judicial business. Persons, on the other hand, who, like De Tocqueville, have fully appreciated the wisdom of the statesmen who created the Union, have formed perhaps an exaggerated estimate of their originality. Their true merit was that they applied with extraordinary skill the notions which they had inherited from English law to the novel circumstances of the new republic. To any one imbued with the traditions of English procedure it must have seemed impossible to let a court decide upon anything but the case before it. To any one who had inhabited a colony governed under a charter the effect of which on the validity of a colonial law was certainly liable to be considered by the Privy Council, there was nothing startling in empowering the judiciary to pronounce in given cases upon the constitutionality of acts passed by assemblies whose powers were limited by the Constitution, just as the authority of the colonial legislatures was limited by charter or by Act of Parliament. To a French jurist indeed filled with the traditions of

<sup>1</sup> *Munn v. Illinois*, 4 Otto, Rep. 113.

the French Parliaments all this might well be incomprehensible, but an English lawyer can easily see that the fathers of the republic treated Acts of Congress as English courts treat bye-laws, and in forming the Supreme Court may probably have had in mind the functions of the Privy Council. But if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a constitution which should in strictness be the 'law of the land,' and in so doing created modern federalism. For the essential characteristics of federalism—the supremacy of the constitution—the distribution of powers—the authority of the judiciary—reappear, though no doubt with modifications, in every true federal State.

Turn for a moment to the Canadian Dominion. The preamble to the North America Act, 1867, asserts with official mendacity that the Provinces of the present Dominion have expressed their desire to be united with the Dominion 'with a constitution similar in principle to that of the United *Kingdom*.' If preambles were intended to express the truth, for the word '*Kingdom*' ought to have been substituted '*States*'; since it is clear that the constitution of the Dominion is modelled on that of the Union. The constitution is the law of the land; it cannot be changed either by the Dominion Parliament or by the Provincial Parliaments; it can be altered only by the sovereign power of the British Parliament. Nor does this arise from the Canadian Dominion being a dependency. Victoria is, like Canada, a colony, but the Victorian Parliament can with the assent of the Crown do what the Canadian Parliament cannot do—change the colonial constitution. Throughout the Dominion, therefore, the constitution is in the strictest sense the immutable law of the land. Under this law again, you have, as you would expect, the distribution of powers among bodies of co-ordinate authority<sup>1</sup>; though undoubtedly the powers bestowed on the Dominion Government and Parliament are greater when compared with the powers reserved to the provinces than are the powers which the Constitution of the United States gives to the federal government. In nothing is this more noticeable than in the authority given to or assumed by the Dominion Government to disallow provincial acts which are illegal or unconstitutional<sup>2</sup>. This right was possibly given with a view to obviate altogether the necessity for invoking the law courts as interpreters of the Constitution; the founders of the confederation appear in fact to have believed that 'the care taken to define the respective powers of the several legislative bodies in the Dominion would prevent any troublesome

<sup>1</sup> See B. N. America Acts, sects. 91, 92.

<sup>2</sup> See Bourinot, p. 76.

or dangerous conflict of authority arising between the central and local governments<sup>1</sup>. The futility however of a hope grounded on a misconception of the nature of federalism is proved by the existence of two fat volumes of reports filled with cases on the constitutionality of legislative enactments, and by a long list of decisions as to the respective powers possessed by the Dominion and by the Provincial Parliaments—judgments given by the true supreme court of the Dominion, namely, the Judicial Committee of the Privy Council. In Canada, as in the United States, the courts inevitably become the interpreters of the Constitution.

Swiss federalism repeats, though with noteworthy variations, the essential traits of the federal polity as it exists across the Atlantic. The Constitution is the law of the land, and cannot be changed either by the federal or by the cantonal legislative bodies; the Constitution enforces a distribution of powers between the national government and the cantons, and directly or indirectly defines and limits the power of every authority existing under it. The federal government has in Switzerland, as in America, three organs—a federal legislature, a federal executive (*Bundesrath*), and a federal court (*Bundesgericht*). Of the many interesting and instructive peculiarities which give to Swiss federalism an individual character, this is not the occasion to write in detail. It lies however within the scope of this article to note that the Constitution of the confederation differs in two most important respects from that of the United States. It does not, in the first place, establish anything like the accurate division between the executive and the judicial departments of government which exists both in America and in Canada; the executive exercises, under the name of 'administrative law,' many functions<sup>2</sup> of a judicial character, and thus, for example, deals with questions having reference to the rights of religious bodies. The federal assembly is the final arbiter on all questions as to the respective jurisdiction of the executive and the federal court. The judges of that court are elected by the federal assembly, they are occupied greatly with questions of public law (*Staatsrecht*), and so experienced a statesman as Dr. Dubs laments that the federal court should possess jurisdiction in matters of private law<sup>3</sup>. When to this is added that the judgments of the federal court are executed by the government, it at once becomes clear that, according to any English standard, Swiss statesmanship has failed as distinctly as American statesmanship has succeeded in keeping the judicial apart from the executive department of

<sup>1</sup> See Bourinot, p. 694.

<sup>2</sup> See Bundesverfassung, art. 113, Bundesgesetz, 27 June, 1874, art. 59, and 2 Dubs, p. 90.

<sup>3</sup> Bundesverfassung, art. 113, & 2 Dubs, p. 92.

government, and that this failure constitutes a serious flaw in the Swiss Constitution. That Constitution, in the second place, does not in reality place the federal court on an absolute level with the federal assembly. In many cases that tribunal cannot question the constitutionality of laws or decrees passed by the federal Parliament<sup>1</sup>. From this fact one might suppose that the federal assembly is (unlike Congress) a sovereign body, but this is not so. The reason why acts of the federal Parliament are treated as constitutional by the federal tribunal is that the constitution itself almost precludes the possibility of encroachment upon its articles by the federal legislative bodies. No legal revision can take place without the assent both of a majority of Swiss citizens and of a majority of the cantons, and an ordinary law duly passed by the Federal Assembly may be legally annulled by a popular veto. The authority of the Swiss Assembly nominally exceeds the authority of Congress because in reality the Swiss legislative body is weaker than Congress. For while in each case there lies in the background a legislative sovereign capable of controlling the action of the ordinary legislature, the sovereign power is far more easily brought into play in Switzerland than in America. When the sovereign power can easily enforce its will, it may trust to its own action for maintaining its rights; when, as in America, the same power acts but rarely and with difficulty, the courts naturally become the guardians of the sovereign's will expressed in the articles of the Constitution.

Our survey from a legal point of view of the characteristics common to all federal governments forcibly suggests conclusions of more than merely legal interest.

Federal government means weak government. The distribution of all the powers of the state among co-ordinate authorities necessarily leads to the result that no one authority can wield the same amount of power as under a unitarian constitution is possessed by the sovereign. A scheme again of checks and balances in which the strength of the common government is so to speak pitted against that of the state governments leads, on the face of it, to a certain waste of energy. A federation therefore will always be at a disadvantage in a contest with unitarian states of equal resources. Nor does the experience either of the United States or of the Swiss confederation invalidate this conclusion. The Union has no powerful neighbours and has no foreign policy whatever. Circumstances unconnected with constitutional arrangements make it possible for Switzerland to preserve her separate existence, though surrounded by powerful and at times hostile nations; and

<sup>1</sup> Bundesverfassung, art. 113, and 2 Dubs, 92.

the mutual jealousies incident to federalism do no doubt in some respects visibly weaken the Swiss republic. Thus, to take one example only, each member of the executive must belong to a different canton<sup>1</sup>. But this rule may exclude from the government statesmen of high merit, and therefore diminish the resources of the state. A rule that each member of the cabinet should be the native of a different county would appear to Englishmen palpably absurd. Yet this absurdity is forced upon Swiss politicians, and affords one among numerous instances in which the efficiency of the public service is sacrificed to the requirements of federal sentiment. Switzerland, moreover, is governed under a form of democratic federalism which tends towards unitarianism. Each revision increases the authority of the nation at the expense of cantonal independence. This is no doubt in part due to the desire to strengthen the nation against foreign attack. It is perhaps also due to another circumstance. Federalism, as it defines and therefore limits the powers of each department of the administration, is unfavourable to the interference or to the activity of government. Hence a federal government can hardly render services to the nation by undertaking for the national benefit functions which may be performed by individuals. This may be a merit of the federal system; it is, however, a merit which does not commend itself to modern democrats, and no more curious instance can be found of the inconsistent currents of popular opinion which may pervade a nation or a generation at the same time than the coincidence in England of a vague admiration for federalism alongside with a far more decided feeling against the doctrines of so-called *laissez faire*. A system meant to maintain the *status quo* in politics is incompatible with schemes for wide social innovation.

Federalism tends to produce conservatism.

This tendency is due to several causes. The constitution of a federal society must be not only a written but (to use a happy expression of Professor Bryce's) a 'rigid' constitution, that is, a constitution which cannot be changed by any ordinary process of legislation. Now this essential rigidity of federal institutions is almost certain to impress on the minds of citizens the idea that any provision included in the constitution is immutable and, so to speak, sacred. The least observation of American politics shows how deeply the notion that the constitution is something placed beyond the reach of amendment has impressed popular imagination. The difficulty of altering the constitution produces conservative sentiment, and national conservatism doubles the difficulty of altering the constitution. The House of Lords has lasted for centuries; the

<sup>1</sup> Bundesverfassung, art. 96.

American Senate has existed for about one hundred years, yet to abolish or alter the House of Lords would be a far easier matter than to modify the constitution of the Senate. To this one must add that a federal constitution always lays down general principles which, from being placed in the constitution, gradually come to command a superstitious reverence, and thus are in fact, though not in theory, protected from change or criticism. The principle that legislation ought not to impair obligation of contracts has governed the whole course of American opinion. Of the conservative effect of such a maxim when forming an article of the Constitution we may form some measure by the following reflection. If any principle of the like kind had been recognised in England as legally binding on the Courts, the Irish Land Act would have been unconstitutional and void; the Irish Church Act, 1869, would, in great part at least, have been from a legal point of view so much waste paper, and there would have been great difficulty in legislating in the way in which the English Parliament has legislated for the reform of the Universities. One maxim only among those embodied in the Constitution of the United States would that is to say have been sufficient if adopted in England to have arrested the most vigorous efforts of recent parliamentary legislation.

Federalism, lastly, means legalism—the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people.

That in a confederation like the United States the law courts become the pivot on which the constitutional arrangements of the country turn is obvious. Sovereignty is lodged in a body which rarely exerts its authority and has (so to speak) only a potential existence; no legislature throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but bye-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; their decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also the master of the constitution. Nothing puts in a stronger light the inevitable connection between federalism and the prominent position of the judicial body than the history of modern Switzerland. The constitutionalists of 1848 desired to give the *Bundesgericht* a far less authoritative position than is possessed by the American Supreme Court. They in effect made the federal assembly for most, what it still is for some, purposes a court of final appeal. But the necessities of the case were too strong for Swiss statesman-

ship; the revision of 1874 greatly increased the power of the federal tribunal. From the fact that the judicial Bench supports under federal institutions the whole stress of the constitution a special danger arises lest the judiciary should be unequal to the burden laid upon them. In no country has greater skill been expended on constituting an august and impressive national tribunal than in the United States. Moreover, as already pointed out, the guardianship of the constitution is in America confided not only to the Supreme Court but to every judge throughout the land. Still it is manifest that even the Supreme Court can hardly support the duties imposed upon it. No one can doubt that the varying decisions given in the legal-tender cases, or in the line of recent judgments of which *Munn v. Illinois* is a specimen, show that the most honest judges are after all only honest men, and when set to determine matters of policy and statesmanship will necessarily be swayed by political feeling and by reasons of state. But the moment that this bias becomes obvious a court loses its moral authority, and decisions which might be justified on grounds of policy excite natural indignation and suspicion when they are seen not to be fully justified on grounds of law. Judges, further, must be appointed by some authority which is not judicial, and where decisions of a court control the action of government there exists an irresistible temptation to appoint magistrates who agree (honestly it may be) with the views of the executive. A strong argument pressed against Mr. Blaine's election was, that he would have the opportunity as President of nominating four judges, and that a politician allied with railway companies was likely to pack the Supreme Court with men certain to wrest the law in favour of mercantile corporations. The accusation may have been baseless; the fact that it should have been made and that even Republicans should declare that the time had come when 'Democrats' should no longer be excluded from the Bench of the United States tells plainly enough of the special evils which must be weighed against the undoubted benefits of making the courts rather than the legislature the arbiters of the constitution.

That a federal system again can flourish only among communities imbued with a legal spirit and trained to reverence the law is as certain as can be any conclusion of political speculation. Federalism substitutes litigation for legislation, and none but a law-fearing people will be inclined to regard the decision of a suit as equivalent to the enactment of a law. The main reason why the United States has carried out the federal system with unequalled success is that the people of the Union are more thoroughly imbued with legal ideas than any other existing nation. Constitu-

tional questions arising out of either the Constitutions of the separate States or the articles of the federal Constitution are of daily occurrence and constantly occupy the courts. Hence the citizens become a people of constitutionalists, and matters, which excite the strongest popular feeling, as for instance the right of Chinese to settle in the country, are determined by the judicial Bench and the decision of the Bench is acquiesced in by the people. This acquiescence or submission is due to the Americans inheriting the legal notions of the common law, i. e. of the most legal system of law, if the expression may be allowed, in the world. De Tocqueville long ago remarked that the Swiss fell far short of the Americans in respect for law and justice<sup>1</sup>. The events of the last thirty-five years suggest that he perhaps underrated Swiss submission to law. But the law to which Switzerland is accustomed recognises wide discretionary power on the part of the executive, and has never fully severed the functions of the judge from those of the government. Hence Swiss federalism fails, just as one would expect it to fail, in maintaining that complete authority of the courts which is necessary to the perfect federal system. But the Swiss, though they may not equal the Americans in reverence for judicial decisions, are a law-respecting nation. One may well doubt whether there are many states to be found where the mass of the people would leave so much political influence to the law courts. Yet any nation who cannot acquiesce in the finality of possibly mistaken judgments is hardly fit to form part of a federal State.

Whether the different parts of the United Kingdom, or whether the different countries which make up the British Empire, could under any circumstances be formed into a federal State with a feeble central government, with a rigid constitution, and with a powerful judiciary, is an enquiry not for lawyers but for statesmen. But no statesman can understand either the capacities or the defects of that federal system, which is a grand piece of legal mechanism, unless he consents to look at its characteristics from the point of view of a lawyer.

A. V. DICEY.

<sup>1</sup> De Tocqueville, *Mélanges etc. Historiques*, p. 455.



## THE LITERATURE OF INTERNATIONAL LAW IN 1884.

IF the past year has produced no work of first-rate importance upon International Law, it has at least been fertile in new editions, and in essays upon subdivisions of the subject.

A systematic view of the science is attempted in several works which have been completed, or translated, or have come to a new edition during the year.

The publication of the second and concluding volume of Professor Lorimer's *Institutes of the Law of Nations*<sup>1</sup> preceded only by a few months the appearance at Brussels of an abridged translation of the whole work by M. Nys<sup>2</sup>. 'The law of nations,' says the learned Edinburgh Professor, 'is the law of nature, realised in the relations of separate political communities.' The book is, in fact, an application to the relations of states of the principles set forth by the author, with reference to the relations of individuals, in his '*Institutes of Law, a treatise of the principles of Jurisprudence as determined by Nature*' (second edition, 1880). If most readers south of the Tweed are likely to hold that such a conception of International Law *pèche par la base*, they will admire and enjoy none the less the lucidity of style, the elevation of sentiment, and the ingenuity of illustration which characterise every page of Mr. Lorimer's writings. The fullest recognition of the existence of these qualities must not however prevent us from disagreeing not only with Mr. Lorimer's conception of his subject, but also with his treatment of it in detail. Of his three grand divisions of International Law, viz. 'public,' 'public and private,' and 'private,' we can acknowledge the claim only of the first-mentioned to be International Law at all, though he has of course ample continental authority for including under the term what is more accurately described as 'the Conflict of Laws,' and for devoting

<sup>1</sup> The *Institutes of the Law of Nations, a Treatise on the Jural Relations of separate political Communities*, by James Lorimer, LL.D., Advocate, Regius Professor of Public Law and of the Law of Nature in the University of Edinburgh, &c. In two volumes; vol. ii. Blackwood, Edinburgh and London, 1884.

<sup>2</sup> *Principes de Droit international*, par J. Lorimer, Professeur de droit de la nature et des gens, &c. &c. Traduit de l'Anglais par Ernest Nys, Associé de l'Institut de Droit International, juge au tribunal de 1<sup>re</sup> instance de Bruxelles. Bruxelles, Merzbach et Falk, 1884.

a hundred pages of the first volume to its discussion. The second volume, with which alone we are directly concerned, deals with those relations of nations which are 'abnormal,' as being 'at variance with the general scheme of the universe,' i. e. principally with War and Neutrality. Neutrality is declared to be a jural relation only when Intervention is impossible, and the Neutrality of States is maintained not to involve that of their subjects, who should therefore be relieved from the restrictions imposed by Foreign Enlistment Acts. With p. 182 ends the systematic portion of the volume, the remainder of which is occupied by a scheme for the establishment of an 'International Nation,' and by a very full appendix of Acts of Parliament and other documents.

At the opposite pole from Professor Lorimer's interesting speculations is the admirable treatise of Mr. W. E. Hall<sup>1</sup>, according to whose profession of faith, 'Existing rules are the sole standard of conduct or law of present authority; and changes and improvements in those rules can only be effected through the same means by which they were originally formed, namely by growth in harmony with changes in the sentiments and external conditions of the body of states.' The original work, as published in 1880, deserved its rapid success by the clearness of its arrangement of the ascertainable rules of the positive law of Nations. In the new edition the author has utilised the space gained by the omission of several documents, which it is too much the custom to reprint in every work of the kind, to expand certain topics, especially that of embassy, which had previously received less attention than others.

Sir Travers Twiss must have found it necessary almost to rewrite the second edition of the first volume of his *Law of Nations*<sup>2</sup>, so complete has been the metamorphosis of the political frame-work of Europe since the appearance of the first edition in 1861. This volume, which is concerned with 'the rights and duties of nations in time of peace,' is not an exhaustive exposition of that subject. It consists rather of a series of valuable essays on the leading topics of the law of peace; such as the 'incidents and modifications of national life,' 'national State-systems of Christendom,' 'the Ottoman Empire,' 'Right of Self-preservation,' 'Right of the Sea,' 'Right of Legation.' An entirely new

<sup>1</sup> A Treatise on International Law, by W. E. Hall, M.A., Barrister at Law. Oxford, Clarendon Press, 1884.

<sup>2</sup> The Law of Nations considered as independent political Communities. On the Rights and Duties of Nations in time of Peace. By Sir Travers Twiss, D.C.L., F.R.S., Member of the Institute of International Law, and one of H.M. Counsel. A new edition, revised and enlarged. Oxford, at the Clarendon Press, 1884.

chapter is added on the Capitulations of the Ottoman Empire. The work contains much which may be vainly sought elsewhere. The information is pleasantly conveyed, and the reader feels throughout that he has to do with one who is not merely a man of books, but who has also enjoyed a long experience in the Courts and in public affairs.

Mr. Miller's volume of 'Lectures on the Philosophy of Law <sup>1</sup>,' in which the author shows himself an apt pupil of Professor Lorimer, would not be mentioned here were it not stated to be 'designed mainly as an introduction to the study of International Law.' It is not to be recommended for this purpose.

Some good chapters in Mr. Wharton's 'Commentaries on Law' (pp. 184-403) are devoted to 'Public International Law,' and 'Private International Law <sup>2</sup>.'

Mr. J. H. Ferguson has published at the Hague and at Hong-Kong the first volume of a 'Manual of International Law <sup>3</sup>.'

The second and concluding volumes of the 'Teorica del Diritto Internazionale' of Professor Macri of Catania, and of the 'Traité de Droit International' translated from the Russian of Professor de Martens of St. Petersburg, should have appeared before the end of the year. A systematic treatise by Professor Bulmerincq of Heidelberg may be shortly expected, and Professor Holtzendorff of Munich is preparing an extensive work to be carried out by the co-operation of a number of jurists.

The History and Antiquities of International Law have been illustrated by 'Les Origines de la Diplomatie jusqu'à Grotius' of M. Nys <sup>4</sup>, who has already done such good service in the same direction by his 'Droit de la guerre et les précurseurs de Grotius,' 1882, and his edition of the 'Arbre des batailles' of Honoré Bonet, 1883. Much light has been thrown upon the early bibliography of the law of Embassy by M. Nys, who seems indeed to have a peculiar aptitude for identifying hitherto untracked personalities.

Count Aurelio Saffi has translated into Italian, with notes and

<sup>1</sup> Lectures on the Philosophy of Law, designed mainly as an introduction to the Study of International Law, by William Galbraith Miller, M.A., LL.B., Lecturer on Public Law, &c. in the University of Glasgow. London, C. Griffin & Co., 1884.

<sup>2</sup> Commentaries on Law, &c. &c., by Francis Wharton, LL.D., Member of the Institute of International Law, &c. Philadelphia, Kay and Brother, 1884.

<sup>3</sup> Manual of International Law, for the use of Navies, Colonies, and Consulates, by Jan. Helenus Ferguson, Minister of the Netherlands in China, &c.; t. i. La Haye, Nyhoff; Hong-Kong, Noronha, 1884.

<sup>4</sup> Les origines de la diplomatie et le droit d'ambassade jusqu'à Grotius, par Ernest Nys, juge au tribunal de 1<sup>re</sup> instance de Bruxelles, Associé de l'Institut de Droit International. Bruxelles, Merzbach et Falk, 1884.

some additional matter, a lecture upon Albericus Gentilis by the writer of this article<sup>1</sup>.

Professor Fusinato of Macerata has produced a very learned quarto, 'Dei feziali e del diritto feziale,' the character of which is sufficiently guaranteed by its appearing in the Transactions of the Lincei<sup>2</sup>.

An elaborate monograph on the Abate Galiani by Professor Pierantoni of Rome is near completion, and Dr. Vladimir Pappafava, of Zara, in Dalmatia, is compiling a critical bibliography of the works upon International Law, both public and private, which have been published from the earliest times to the present day.

A number of isolated topics belonging to the law of nations in time of peace have been touched upon by various writers. In his inaugural lecture<sup>3</sup> at Macerata, Professor Fusinato has dealt judiciously with a subject which is not easily so dealt with in Italy, that of Nationality. Professor Olivi of Padua has written on the immunity of ambassadors<sup>4</sup>. M. Rolin-Jaequemyns has printed an important speech, delivered by him in the Belgian Chamber, on diplomatic representation at the Vatican<sup>5</sup>. Extradition has been discussed by Professors von Bar<sup>6</sup> of Göttingen and Lammasch of Vienna<sup>7</sup>.

Sir Sherston Baker has produced an exhaustive monograph upon the now almost forgotten office of Vice-Admiral of the Coast<sup>8</sup>. M. Perels has produced a Handbook of the Maritime Law of the German Empire<sup>9</sup>. The navigation of rivers, and especially of the Danube with reference to the rights of Roumania, which gave rise to so large a crop of literature in the preceding year, is the subject of a tract by Dr. Theodor von Bunsen, in von Holtzendorff's admirable series of Zeit- und Streit-Fragen<sup>10</sup>, and of another by Dr.

<sup>1</sup> Alberico Gentili, discorso inaugurale letto in Oxford dall' avv. Thomas Erakine Holland, Professore, &c., tradotto da Aurelio Saffi. Roma, Loescher & Co., 1884.

<sup>2</sup> Dei feziali e del diritto feziale, contributo alla storia del diritto pubblico esterno di Roma, memoria del dott. Guido Fusinato. Roma, coi tipi Salviucci, 1884.

<sup>3</sup> Dott. Guido Fusinato, Il principio della scuola italiana nel diritto internazionale pubblico, prolusione, &c. Macerata, tip. Bianchini, 1884.

<sup>4</sup> Dell' indipendenza dell' inviato diplomatico e della sua immunità nelle materie civili, memoria del Professore Olivi. Modena, 1884.

<sup>5</sup> Rétablissement des relations diplomatiques entre la Belgique et le Vatican, Discours prononcé par M. Rolin-Jaequemyns à la chambre des représentants de Belgique, le 7 Août, 1884. Bruxelles, P. Weissenbruch, 1884.

<sup>6</sup> Zur Lehre von der Auslieferung: reprinted from the Gerichtssaal, Bd. xxxiv.

<sup>7</sup> Das Recht der Auslieferung wegen politischer Verbrechen. Wien, 1884.

<sup>8</sup> The Office of Vice-Admiral of the Coast, being some account of that ancient office, by Sir Sherston Baker, Bart., Barrister-at-Law, Associate of the Institute of International Law, &c. London, privately printed, 1884.

<sup>9</sup> Handbuch des allgemeinen öffentlichen Seerechts im Deutschen Reiche. Berlin, Miller, 1884.

<sup>10</sup> Die Donau, von Dr. Theodor von Bunsen. Berlin, C. Habel, 1884.

Jellinek<sup>1</sup>. Professor Lawrence, of Cambridge, has published six well-written essays<sup>2</sup>, with reference mainly to questions of contemporary interest, such as the Suez and Panama canals, in discussing which he has shown considerable power of disentangling complicated diplomatic discussions. On questions of legal theory he is perhaps not so successful. Roumania, in the person of M. Tanoviceano, has produced an international jurist of no small merit. His treatise 'De l'Intervention'<sup>3</sup> is the best book upon the subject.

The literature of the law of war has been less copious than that of the law of peace. Captain Guelle has published the first volume of a 'Précis des Lois de la Guerre sur Terre,' with a preface by M. Pradier-Fodéré<sup>4</sup>. Sir T. Twiss has written a pamphlet on maritime law since the Declaration of Paris<sup>5</sup>. Col. Maurice has prepared for the Quarter-Master-General's Department an account of Hostilities commenced (1700-1870) without a Declaration of War<sup>6</sup>. M. Negrin has translated into Spanish with annotations the Oxford Manual of the Laws of War<sup>7</sup>, which had indeed already been translated into Spanish by M. Leguizamon, of Buenos-Ayres, as it has been into most other languages, including Chinese.

The law of Neutrality has been illustrated by Dr. Bergbohm of Dorpat. His essay upon the Armed Neutrality of 1780<sup>8</sup> deals with its secret history, and with its effect upon the development of maritime law.

It would be in accordance with continental practice if this article contained some account of the recent literature of the so-called 'Private International Law.' Any mention of this literature has however been designedly omitted, in order to emphasise the opinion of the writer that it does not deal with international law at all.

<sup>1</sup> Oesterreich-Ungarn und Rumanien in der Donaufrage. Wien, Hölder, 1884.

<sup>2</sup> Essays on some disputed questions of Modern International Law, by T. J. Lawrence, M.A., LL.M., Deputy Whewell Professor of International Law, &c. Cambridge, Deighton, Bell & Co., 1884.

<sup>3</sup> De l'intervention au point de vue du Droit international, par Jean Tanoviceano. Paris, Larose et Forcel, 1884.

<sup>4</sup> Précis des Lois de la Guerre sur Terre, par Jules Guelle, Capitaine, Professeur adjoint à l'école spéciale militaire de St.-Cyr, avec une préface de M. Pradier-Fodéré. Tome i. Paris, Pedone-Lauriel, 1884.

<sup>5</sup> Belligerent Right on the High Seas since the Declaration of Paris (1856), by Sir Travers Twiss, D.C.L., &c. &c. London, Butterworths, 1884.

<sup>6</sup> Hostilities commenced without Declaration (1700-1870), prepared for the Quarter-Master-General's Department, by Col. Maurice, R.A. London, Clowes & Son, 1884.

<sup>7</sup> Manual de las Leyes de la guerra continental, publicado por el Instituto de derecho internacional, votado en la sesion plena de Oxford, &c. Traducido con notas por D. Ignacio de Negrin, intendente de Marina. Madrid, 1884.

<sup>8</sup> Die bewaffnete Neutralität, 1780-83. Eine Entwicklungsphase des Völkerrechts in Seekriege, von Carl Bergbohm. Berlin, 1884.

On the other hand, no such estimate of the past year as has here been attempted would be complete which did not contain grateful reference to the periodicals especially devoted to the interests of the science, and to the standard collections of diplomatic acts. The 'Revue de Droit International,' under the able editorship-in-chief of M. Rivier, has well maintained its high reputation by the contents of its sixteenth volume; and M. Clunet's 'Revue de Droit International Privé,' which contains much that bears upon international law properly so called, has creditably reached its eleventh year. The 'Archives Diplomatiques,' founded in 1861 and now admirably edited by Professor Renault, is a storehouse of information; and the ninth volume of the second series of the 'Nouveau Recueil Général de Traités' of Martens, now edited by M. Jules Hopf, is as indispensable as any one of its sixty predecessors.

T. E. HOLLAND.

## Reviews and Notices.

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[Short notices do not necessarily exclude fuller review hereafter.]

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*An Introduction to the Study of Justinian's Digest: containing an account of its composition and of the jurists used or referred to therein, together with a full commentary on one Title (De usu fructu):* by HENRY JOHN ROBY. Cambridge: at the University Press. 1884.

IF there is any truth in the saying that supply is created by demand, the appearance of this book augurs well for the future fortunes of the Civil Law and its study in England. Until very recently no portion of that law found any place in the curriculum of our Universities or Examining Boards except its Institutional treatises, and of these the Institutes of Justinian was for some while read alone, until it was perceived that the educational results which it produced would be improved by studying beside it the earlier work of Gaius upon which it was itself so largely based. But no person who confines himself to these works has any real idea of what the Roman Law was. As little might one expect a reader to form any true conception of the spirit and methods of our own law, as understood by a lawyer, from the perusal of a textbook on some branch or other of it which carefully concealed the origin of the rules which it expounded by not referring to a single case or a single judicial dictum. The *suppressio veri* would be a *suggestio falsi*, for the reader would probably conclude—unless indeed he knew better already—that the legal rules he had been studying had in the main been created by Act of Parliament. No student of Roman Law who does not go outside his Institutes has any idea of its practical side: of the habit of mind which its practice developed in its great masters; of their ways of looking at legal problems, and of working out the judgment which the law will pronounce on a state of facts submitted to them. An hour's work at a Title of the Digest will bring the business aspect of Roman Law more home to one than days spent over the Institutes. There we seem to see the practising lawyer actually in his chambers, with his case before him: turning it over this way and that, and looking at it from every side to make sure of not missing its true legal environment: consulting the works of sages of the law now passed away, and sometimes finding that a pregnant dictum throws a flood of light upon some difficulty in his case which has so far baffled him, sometimes led away to a piece of subtle criticism on or solemn argument with the author with whom he is holding

communion. It is the keen life and reality of the Digest, compared with the academic flavour of the Institutes, which makes it so attractive to a lawyer of any nation who takes an interest in the intricacy of legal problems, and in the methods by which they should be solved. There have been signs of late that we in England are beginning to believe somewhat in the judgment of Chancellor Kent, which Mr. Roby prefixes, with some similar commendations, to the present volume: 'With all their errors and imperfections, the Pandects are the greatest repository of sound legal principles applied to the private rights and business of mankind that has ever appeared in any age or nation.' The Oxford University Press has issued a series of Select Titles from the Digest, taken from all parts of the law: that of the sister University has given us one or two Titles with translations and a slender apparatus of notes and introduction. More recently still the Board of the Faculty of Law at Oxford has prescribed a close study of a single Title to those who aim at a first or second class in the Honour School of Jurisprudence; and an acquaintance with some part or other of the Digest has been for some time expected from higher students who seek a degree in law at any of the Universities of Oxford, Cambridge, and London. Mr. Roby has thus well chosen his time for providing English readers with a systematic Introduction to the study of this portion of the Corpus Juris. The execution of his book is very scholarly, but the break between its two parts is necessarily so abrupt that it would probably have been a better plan to have made each part a separate work. The suspicion is forced upon one's mind that originally Mr. Roby contemplated only the editing of a single Title of the Digest, with full commentary and possibly a brief introduction to the legal topic which it handled, but that later the accumulation of materials led him to combine with the work of exegesis a general Introduction to the study of the whole work. If the latter part of his book had been his primary object, it is not easy to see why he should have selected for illustration the Title which he has; a selection which he himself tells us in his preface was determined by accident, though he has seen no reason for regretting his choice. He seems indeed to overrate the interest which the Roman usufruct has for English lawyers. On a superficial examination, it is true, there is much in its doctrines which resembles our law of life interests, but our conception of an 'estate' is so peculiarly un-Roman that any attempt to apply the analogy to English circumstances would probably end only in errors. No branch of the Roman Law is really so useful to the English lawyer as that which deals with the Consensual contracts, and if Mr. Roby had not been controlled (as he himself says he was) by accident, he would have been wiser in selecting a Title on the law of sale or of partnership as a practical illustration of the utility and educational interest of the Digest to us in England.

As it stands, the book consists of two portions. The Introduction to the Study of the Digest, with certain Appendices, covers



260 pages; the Title 'de Usufructu' and Commentary thereon takes 250 more, of which nine-tenths are commentary. Of the Introduction it is almost enough to say that it is a thorough and truly scholarly piece of work. The introductory chapter deals with the general character of Justinian's codification; a well-worn subject upon which of course it is difficult to say much that is new: the next two discuss the division of the Digest and the order of the Titles, and the order of extracts in the Title itself. An exhaustive examination of the first of these two questions leads the author to the conclusion that the dominant idea in the arrangement is 'that of the order of matters to be considered in the conduct of a suit.' Whether the compilers of the Digest had any definite idea in the matter may certainly be doubted. At any rate Mr. Roby is not much more successful than other theorists on the subject in making his facts fit in with his hypothesis, for the 'disturbances or apparent disturbances to his order' are serious enough to largely impair its value. In Appendix A (pp. 253-258) we have the idea elaborately worked out in a tabular form, in which the connection of thought which Mr. Roby thinks he has detected can be taken in at a glance. The chapter on the order of extracts in the Title, in which he expounds and illustrates Bluhme's famous discovery, is more valuable because it is surer ground. Bluhme's argument is so put as to carry absolute conviction that here the connection of thought arises mainly from the compilers, subdivided into three committees, having taken as the foundation several systematic juristic treatises, compared them with one another, and given us 'blocks' of them pared away to avoid repetitions and then squeezed together into a more or less homogeneous mass. Appendix B (pp. 259-271) is designed to show the order of the works from which extracts were taken for the Digest, and the principle upon which they were divided among the three sub-committees into which the commissioners were broken up. The process of paring and alteration which the extracts underwent in order to avoid inconsistency and the retention of obsolete rules is illustrated by the comparison of some passages from ante-Justinian law-works (the Institutes of Gaius, the *Regulæ* of Ulpian, the *Sententiæ* of Paulus, the *Collatio*, and the Vatican fragments) with themselves as they appear in the Digest after passing through the crucible of Tribonian.

What follows is perhaps the most interesting part of the book: a very full account of all the Roman jurists referred to in the Digest, and not merely those whose works contributed to its pages. Here Mr. Roby has outstripped all previous writers, in accuracy no less than in fulness and interest. Not only are the writings of these men enumerated and described, but their lives and personal characteristics, so far as history has preserved any record, are brought before us with a lightness of touch and a fund of anecdote which are genuinely artistic. Scattered through these 125 pages are some excellent discussions of points which are suggested by the names or works of individual jurists; such as the clues afforded by

style or language to the date of the composition; the well-known division of the lawyers into two sects or schools during the first two centuries of the Empire, and the nature of the opposition between them; the revision of the Perpetual Edict by Salvius Julianus; the personality of 'Gaius,' with the speculations of Mommsen as to his calling and domicile; the existence of a generally applicable Provincial Edict; and the style and eminence of Papinian, Ulpian and Paulus, the three greatest jurists that Rome produced. Appendix C shows in a convenient form the relative proportion in which these various writers were used to form the Digest. Then we have a valuable chapter on lawyers' Latin, which, being mainly devoted to the grammatical peculiarities of this part of the Corpus Juris, might have been supplemented with some account of its special vocabulary. The authorities for the text of the Digest, and the different modes of citing it, are learnedly discussed in the two succeeding chapters.

All this first part of Mr. Roby's book is so good that criticism is almost disarmed. But I cannot help thinking that he would have improved it by adding a general chapter on what cannot be more aptly described than as the 'legal habit' of the jurists upon whose lives and writings he has actually said so much. There are certain general characteristics discernible in all their work—a kind of inherited instinct of manner, a dominating logicalness, an air of conscious mastery of the topic—born and bred of the circumstances of their age and nation, which give a unity and homogeneity to their writings for which we look in vain in other legal literatures. The English textbook writer is always painfully conscious that he is a private person who must give chapter and verse in support of his statement of the law. The Roman jurist was chapter and verse to himself. His possession of the authority to give a written opinion binding on judges, which they must accept as law, lends a dignity to his dicta, and an interest to his arguments, which are missing in even our best legal treatises, and which explain in large measure the peculiar influence which his writing exercises over even a mind inclined at first to struggle against it. Mr. Roby has not, I think, said enough to show how it came about that far the greater portion of the extant Roman Law was *made* by professional lawyers; made directly, and not through the weight of their opinions and arguments on a judicial bench constitutionally above them. If he had followed out the line of thought suggested by Sir H. Maine's observation that all the best intellect of the nation was for centuries engrossed in the study, application, and development of the law, he might have given us a richly suggestive explanation of many questions which occur to a reader habituated to law both made and expounded after a different fashion. There are plenty of remarks scattered through the account of the jurists which bear upon this subject, but they require to be gathered together and systematised before their full force and significance can be appreciated.

The Latin text of the Title 'de Usufructu' (Dig. VII. 1), which is

taken from Mommsen's edition of the Digest, with a few conjectural emendations (the MS. readings for which are given in foot-notes), is broken up into convenient passages, each headed by a line describing the part of the topic which it handles, and accompanied by a brief marginal summary of its contents. I think that Mr. Roby has erred in not prefixing to the text a short account of the place which Usufruct occupies in the law. If we assume a reader who has not been systematically grounded by an institutional course of reading or lectures, he will find himself very much at sea from not understanding the nature of a servitude in relation to dominium, the difference between servitudes personal and prædial, and that between usufructus and usus. It is true that all these points are cleared up in the Commentary, but that, so to speak, is after the horse is stolen: one who knows these things clearly beforehand will be able to attack the text far more intelligently than one who does not.

On the Commentary itself it is difficult to be critical, and still one cannot feel perfectly satisfied with it. And the reason of this is, that though in point of accuracy of legal knowledge, thoroughness of execution, and scholarly insight, it would be hard to surpass, yet one feels throughout that Mr. Roby is trying to ride two horses at once when one would do. The fact is that Mr. Roby is too much the scholar. There seems to be something incongruous in commenting on a congeries of legal texts proceeding from a variety of authors in the same temper and after the same fashion as those in which one would comment on Cicero or Demosthenes. As we turn over each page, we are constantly asking ourselves the question whether the next lot of notes will require most attention from the scholar or from the lawyer. If the pure student of Latin literature reads them, he will continually be interrupted by discussions of legal problems which he cannot really understand; if they are attacked by a civilian, he will probably wish Mr. Roby the scholar was anywhere else. Philological notes, it is submitted, are out of place in such a book as this, though it would be presumptuous to question their value in any other form if they proceeded from an author of such established reputation; and even much that is purely exegetical is somewhat tedious to a reader who wants to get on rapidly with his text. Of this kind are the often discursive notes on the shifting meaning of words in classical no less than in legal Latin (e.g. *dare* p. 34, *cavere* p. 57, *sarcire* p. 60, *silva cædna* p. 77, *abuti* p. 117, *recipere* p. 208, *adsignare* p. 236), instead of which it would probably have been better to plainly state the sense of the word in the context before the reader, and to refer him for its meaning in other passages to Brisson, Dirksen, or Heumann. So too now and then Mr. Roby translates expressions the meaning of which is so obvious to the meanest Latin scholar that one feels inclined to wonder why he did not give a complete English version of the text: thus he tells us that *ceteris rebus* means 'other things' (p. 39): *in multis casibus* 'in many cases' (p. 41): *ab initio* 'originally' (p. 44): *corruiissent* 'had fallen down' (p. 61): *fruc-*

*fructuarium quoque* 'a fructuary as well as others' (p. 101): *sunt casus quibus* 'there are cases in which' (p. 103): *generaliter* 'generally' (p. 119): *finge enim* 'for suppose' (p. 128): *cujus gratia* 'for whose sake' (p. 152), &c. But these are small matters; they are mentioned only to show that the notes would not suffer for a little curtailment, while the general utility of the book to students, and its practical success, would probably be enhanced if the text had not been quite so much smothered under the Commentary. For the Commentary itself is excellent; it is not merely that no passage is left unexplained which could possibly require explanation, but Mr. Roby has pondered every word in his text so deeply as never to fail in bringing out its full signification: and this is particularly to be commended, because the very single words of Roman Law are pregnant with meaning which a reader ordinarily careful is apt to miss. The note on '*omnium prædiorum*' (p. 28) is an excellent example of Mr. Roby's thoroughness in this line. Moreover, one has not to read far before one finds that Mr. Roby's law may be entirely depended on. In many cases he might have saved space by referring to other English books which treat fully and correctly of matters arising incidentally out of the text (e. g. the remedies on *Furtum*, p. 92), but he prefers to do his work in thorough fashion, though a great number of his notes do not add much to information already accessible to English readers. Here and there, however, we find pieces of independent work. Among these are the discussion (pp. 29 sqq.) of the question whether it is not a mistake to suppose, as most writers do, that provincial land could not be owned '*ex jure Quiritium*' before the time of Justinian, and the examination of the terms *noxæ*, *noxia*, in connection with noxal surrender (p. 132), and of the principles on which the Romans calculated the capitalised value of a life interest (p. 188). But most of the notes are very good, even when they do not add much to what we knew already: as among the best I should select those on *partio et stipulatio* as a mode of creating servitudes (p. 37): the fructuary's right to minerals (p. 109): the owner's incapacity to acquire servitudes for or impose them on property subject to a usufruct (p. 124): the rights of masters over their slaves' persons (p. 128): *usucapio* in connection with the acquisition and extinction of servitudes (p. 137): *capitis deminutio* (p. 165): *peculium* (p. 193): and *res judicata* (p. 199).

I have noticed but few mistakes, but, such as they are, no doubt the author would like to have them pointed out. On p. 36 he says that under Justinian's law every legatee had a *vindicatio* for the recovery of the *res legata*; the better opinion seems to be that this was so only where the *res legata* belonged to the testator (see Windscheid, iii. p. 361). In the enumeration of the cases of *missio in possessionem* on p. 55 that which perhaps most frequently occurred is omitted, viz. the grant of possession of an insolvent's estate in the procedure by *bonorum emptio* introduced by Publius Rutilius (Gaius, iii. 79). On p. 93 a note is so carelessly worded as to lead one to suppose that *condictio* was in form '*arbitraria*,' which

many persons less learned in Roman Law than Mr. Roby must know was not the case. On p. 99 the 'interpretatio' which the earlier Republican jurists brought to bear on the Twelve Tables and other old Statutes is confused with the prætor's activity in granting actions on cases not strictly speaking within their letter. The juristic interpretatio of the lex Aquilia mentioned by Justinian in Inst. iv. 3. 10 is quite different from its extension by actiones in factum, which no Roman would have included under the term. Some of Mr. Roby's terms and expressions also are not very happy. To render 'coemptio,' the process by which manus was sometimes created, by *co-purchase* (p. 53) is misleading, because there was nothing mutual about it in historical times. So too the use of 'injunction' for all sorts of interdicts (p. 100) is liable to confuse an English reader, who distinguishes an injunction from a mandamus: and the same may be said of 'cestui que trust' for fidei commissarius (p. 83), for there is nothing in Roman Law corresponding to the permanent fiduciary relation between trustee and cestui que trust, and a reader might hastily associate with the Roman relation ideas of legal and equitable ownership and so forth which would lead him into error. On p. 97, *propriarius* is represented by 'proprietary' instead of 'proprietor.' 'Head-breaking' (p. 166) for *capitis deminutio* is simply grotesque. There are also a few misprints which have escaped Mr. Roby. About half-way down p. 37 'contact' should clearly be 'contract'; and on p. 40 'distinction' is printed for 'destruction.' On p. 84 it is difficult to see why a dominus who hired the usufruct from the fructuary should be liable to the latter by an action on 'sale'; of course it should be 'hire.' At the bottom of p. 87 there is something wrong about Inst. vi. 30. l. 18. pr. But speaking generally, the proofs have been corrected with great care; there is an excellent index; and the type and paper of the book are worthy in all respects of the Cambridge Press. Mr. Roby may justly consider that he has laid English Romanists under a deep obligation, for notwithstanding a few imperfections, his book will enable them to do some intelligent work at the Digest, which hitherto has been little more than a terra incognita to most persons in this country who have acquired a competent knowledge of the elements of Roman Law. The field was so vast, and the maze so great, that their heart has failed them. But they will now be no longer able to plead that they do not know where to go to find out all about it. The only danger seems to be that they may fear that they have got to find out more than they have time for; and it is for this reason that I could have wished Mr. Roby had been in places less exhaustive and less learned.

J. B. MOYLE.

#### NOTE.

Professor Baron, of the University of Bern, has recently published through Simion of Berlin the first part of a new 'Geschichte des Römischen Rechts,' which contains 'Institutionen' and Civil

Process: the second part, which will deal with 'Staatsrecht,' Criminal Law and Procedure, the Sources of Roman Law, and the juristic literature, may be expected in 1887. The present volume, which covers 471 pages, is characterised by the same lucidity and historical power which have won such a reputation for the author's 'Pandekten.' In arrangement the order of the Institutes is more closely followed than by most of the German Institutional writers, the chief disturbance being the excision of the law of inheritance from between the law of rights in rem and that of obligations, and its discussion between the latter and the law of civil procedure. In execution the book steers a course midway between such works as that of Puchta on the one hand, and those of Hölder, Marezoll and Salkowski on the other: the original texts are not cited, as they are by the latter writers, so that the exposition is fuller and more continuous. To students of Roman Law who read German this edition may be safely recommended. J. B. M.

*Notes on some of the Characteristics of Crime and Criminals in the Peshawar Division of the Panjâb, illustrated by Selections from Judgments of the Sessions Court from 1872 to 1877, by G. R. ELSMIE, B.C.S., Judge of the Chief Court of the Panjâb, and late Additional Commissioner and Sessions Judge, Peshawar. Lahore: Printed by W. Ball, 1884. 8vo. 147 pages.*

MR. ELSMIE has done good service to young magistrates commencing an Indian career, especially to those whose lot may be cast on our interesting North-West frontier, by the admirable illustrations he has given in his recent work of the difficulties that are encountered in dealing with crime in localities where unseen forces are enlisted against the authorities in the shape of the prejudices and superstitions that have been in existence for long centuries before our efforts to introduce a civilised system of judicature commenced.

No one could have approached this task with a more valuable and varied experience than the author, who held for many years the position of Sessions Judge of the Peshawar Division, and was then promoted to a seat on the Judicial Bench at Lahore, the headquarters of the Panjâb, where he has to confirm sentences or to review judgments on appeal.

The young English officer has to learn that many offences regarded as such by ourselves are looked upon as virtuous deeds by the people whose evidence we seek in our efforts to bring the criminals to justice. Such criminals are locally considered martyrs to principles. Old feuds are for the moment forgotten in a general attempt to screen the accused; and when to such difficulties as these we have to add the venality of the police authorities and the not unnatural dislike of all classes to sacrifice their time and pursuits to attendance in courts for the most part presided over by foreigners, it will be

readily admitted that our judges and magistrates on the frontier are heavily handicapped. Last and not least, it must be borne in mind that the language in which the evidence is given is commonly Pathan or Afghan, which very few of our hard-worked officers have leisure to acquire a full knowledge of. Any shortcomings in this respect must, it need hardly be said, add greatly to the opportunities of corrupt interpreters, or to the possibilities of misunderstandings and mistakes in translating depositions. Something has been effected of late years to remedy this weak point by examinations in Pushtoo, on passing which the successful candidates receive special allowances.

I had nearly added to the other difficulties the ignorance that prevails even more than in other parts of India, but that I recalled to memory instances in which ignorance facilitated the course of justice; as, e.g. when the accused had hacked a dead body to support their made-up story of the cause of death, unconscious that a Civil surgeon could, and did, give evidence that the wounds were inflicted after death! On the other hand, the Special Correspondent of the 'Times' tells us (Nov. 24) that the criminal classes are being educated in a very wrong direction. The telegraph wire fixes a rendezvous hundreds of miles inside our frontier; the State or other railway conducts the criminals comfortably to the scene of action; the Parcels Post thoughtfully carries their arms for them, saving all anxiety as to personal search; and the Money Order Office ultimately sends them their share of the 'swag!'<sup>1</sup>

In the face of such an undesirable display of intelligence we need all the resources of civilisation, and it is to be hoped that the well-considered propositions of the Panjāb police officers, as referred to in the 'Times' telegram from India, may be carried into effect, and a joint action of the local and railway police and telegraph agents be devised. No precaution tends more to defeat police corruption and the efforts to cause a miscarriage of justice by misrepresentations of the facts of a case than the absolute *insistence* on a report being submitted by the local inspector *directly* a report of a crime has been received at a police station. Once give time for the concoction of a long and plausible story, and the result not uncommonly is that exceeding great pains are taken to misrepresent the facts for one or more bad objects—say to screen an offender who has paid handsomely, or to save trouble to the village community by throwing the responsibility on neighbours, or to punish some enemy who can be accused by witnesses who from partizan feeling or for very small payment are ready to tell any story that may be put into their mouths.

As to ignorance, I may mention here an instance of what has been possible in the way of superstition—far more so formerly than now—on the part of our native subordinate magistrates. A gentleman

<sup>1</sup> The ignorance of a criminal helped the presiding officer to feel certain that his judgment was correct in a case where Major (now Sir Harry) Lumsden explained to the accused that he had been convicted of murder and would be hanged, on which the man cried, 'Justice, justice! I am innocent! I did not murder him; I only held his legs.'

of considerable experience and great merit, and one for whom I had the highest respect, once in committing a murder case for trial wrote much as follows in summing up the evidence he had collected: 'And now, what account of the crime does the accused give? His story is that the deceased man was murdered by a Djin; and what are the ascertained facts? It is proved that deceased was stabbed with a knife or dagger, while, as is well known, a Djin (or demon) *strangles his victim*!'

Some striking cases are given by Mr. Elsmie showing the difficulties created by the common attempts made to add false to true evidence in support of an accusation, and to accuse the instigator rather than the actual perpetrator of a murder; or, to quote from the book, 'The unfortunate thing is, that one cannot believe . . . as it is the constant practice in this country for wounded men not to take the names of those who actually wound them and whom they distinctly recognise, but to denounce the persons who they feel sure were the instigators of the attack, thereby defeating their own object and the ends of justice.' Again, a quotation is given from a judgment recorded in the Lower Provinces (of Bengal) as far back as 1803, bearing on this matter:—

'... Very frequently the witnesses . . . swear to facts in themselves utterly incredible for the purpose of fully convicting the accused, when, if they had simply stated what they saw and knew, their testimony would have been sufficient. They frequently, under an idea that the proof may be thought defective by those who judge according to the Regulations, and that the accused will escape and wreak their vengeance upon the witnesses who appear against them, exaggerate the facts in such a manner that their credit is utterly destroyed. . . .'

I have never heard of any sacrifice of self on the frontier quite equalling that which I believe has been known to occur in China, of a criminal or his relations paying a man to take his place at the scaffold; but a very remarkable case occurred of a man feigning to be a murderer at the time Shere Ali—who afterwards earned an infamous notoriety as the assassin of Lord Mayo—was charged with the murder for which he was convicted and sent to the Andamans. The commencement of Shere Ali's defence at Peshawar was that a carpenter who resided in the same village as the murdered man and was known to have a bitter feud with him was the real culprit and should be arrested at once. Mounted police were promptly sent to the village, only to find that the carpenter had just decamped to the hills. His hiding-place having been discovered in independent territory, men were sent to learn, if possible, what share, if any, he had had in this murder; and these returned to depose that the refugee openly avowed and gloried in his crime. More than a year afterwards the writer of this paper, who had tried the case, was riding out of the Khyber Pass with some Affghans, when one of them said on passing a graveyard, 'That is the tomb of Hyder, the uncle of the man murdered by Shere Ali.' Q. 'What became of the carpenter who fled at the time?' A. 'He is still in the hills.' Q. 'Had he any-



thing to do with the murder?' A. 'Nothing whatever. Shere Ali promised him three hundred rupees to abscond so that his guilt might be assumed.' Q. 'And did he get the money?' A. '*Not he*; how could he when Shere Ali was imprisoned and sent away?' I may add that in this case I noticed utter inattention to the evidence on the part of the assessors, who at the close of the proceedings, without consultation, found a verdict of 'Not Guilty.' Bent on ascertaining the reason for this, I instituted enquiries in the town of Peshawar where they lived, and found that they made no secret of their reasons: which were, 'Whether Shere Ali killed the man or not, he was more than one life to the bad in the blood-feud, and so was justified in taking this life.'

The most startling instance I can give of the curious mixture of good and bad in a frontier murderer carries me back thirty-five years. Kohat had just been annexed. A murder occurred twenty miles west of that place; a young man stabbed his enemy in the stomach at night as he slept, and escaped over the range of hills close by into Afridi-land. The police seized his family and chattels and sent them off to Kohat. An order was at once sent on the report of this action to release them, but before the order could be carried out the murderer had re-crossed the range, surrendered himself to the police inspector at Kohat, and requested that his relations might be set free.

Here is another Kohat case. A boy of sixteen or seventeen being asked for his defence, naively stated: 'I asked for the hand of — in marriage. Her parents laughed at me, saying, "Your enemy is alive." I enquired, "And why my enemy?" They said, "Go and ask." I did so, and learnt for the first time that my mother had eloped in my infancy with the man they called my enemy, and had died of cholera soon after, but her paramour was alive. I said, "Can any one tell me where he lives and point him out to me?" Some one agreed to do so, and I went with him many miles; he was pointed out to me, and I stabbed him.'

In another case a witness for the prosecution gave details of a murder and the reasons for it, winding up with this remarkable avowal: 'By right and relationship it was *my* duty to carry on the feud, but I was a poor creature or I should be standing in the prisoner's place.'

There is a grimly comical side to the following anecdote. A well-to-do Pathan landowner and a poor Cashmiri henchman were tried and convicted of a murder in Ensufzai in the Peshawar Valley, and both throughout the proceedings from the police station to the gallows stoutly denied all share in the crime. Just before they were hanged the Cashmiri called to the other, 'Oh Khan, you said you would have my family provided for if things went wrong with me in this matter.' The other paused for a minute, and then called to a man in the crowd, 'Oh, so and so, see that his people are cared for!' and that order was doubtless as effective as any regular will would have been.

One result of the untrustworthy oral evidence given from such

crooked motives as indicated in the foregoing remarks and in the sample cases quoted in Mr. Elsmie's work is that the magistrates and judges on the frontier, and indeed more or less all over India, lean more on circumstantial evidence than they do here; for, as has been well said, though circumstances can lie they seldom do so, while Oriental witnesses almost invariably distort and commonly invent facts as they tell their story; and often so cleverly that the most experienced officers, both native and European, are puzzled. As Mr. Elsmie writes, 'The judgments of native officers constantly proclaim the inability of the writers to distinguish between truth and falsehood in oral evidence.' Again: 'Assessors (native) have often replied to me, "God only knows. Everything depends on whether he (witness) has a motive for speaking falsely or not."'

I have yet to notice one more strong motive for withholding evidence or stating what is false. The consequences of offending an influential neighbour in the Peshawar Division are often terrible and form the best excuse for lying witnesses. Persecution or even death may follow hostile evidence against a village tyrant, and, on the other hand, powerful friends may be gained by screening an offender.

The best weapon with which to meet the many and lamentable obstructions to justice that have been referred to is *personal and prompt investigation on the scene of the crime, where this is possible*: and it pains me to add that such investigation is becoming less and less possible under our modern system of work. As a rule, any officer who gave a day to investigating on the spot a murder or wounding case would find that important work in other departments would have to be neglected and arrears would begin to accumulate. As matters stand, our police officers and magistrates can only afford in exceptionally important cases to give their time for many hours consecutively to following up the threads of enquiry on first receiving a report of a crime, though every hour that is lost greatly improves the chances of escape of the criminal.

RICHARD POLLOCK,  
Late Commissioner, Peshawar.

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*Pleas of the Crown for the County of Gloucester before the Abbot of Reading and his fellow justices itinerant in the fifth year of the reign of King Henry the Third and the year of Grace 1221.* Edited by F. W. MAITLAND.  
London: Macmillan & Co., 1884. 8vo. pp. lii and 155.

THE Peshawar frontier in the nineteenth century is very unlike England in the same century, but much less unlike England in the ninth century, or even in the thirteenth. A piece of solid and carefully produced evidence, like this of Mr. Maitland's, is of more value than infinite speculations in showing us what rough work

law has had to do in the West, as it still has in the East, and very lately had in the farther West, before the fabric of modern civilization was solidly founded. Law is the master-builder of the commonwealth, but it can in no wise be said of her that 'she lays her beams in music.' These old records of Gloucestershire, like those late ones of Pesháwar, are a tale of discord and violence. So far their burden is more modern (for ancient and modern are not terms of chronology in these matters), that the blood-feud is not the dominant motive of man-slaying. 'For the more part the crimes are the crimes of plunderers; a gang of robbers breaks a house, slays, and steals' (Introd. p. xxxv). The 'manly English habit' of trusting to nature's weapons—if it ever really existed as a national habit—was yet unborn in the year 1221; for Mr. Maitland notes that 'stabbing is a very common crime; the Englishman carries a knife (*cnipulum*), and on occasion uses it'—therein resembling the modern Pathán, though I doubt if any form of mediæval European knife can have been so truculent a weapon as the Afridi *chára*. 'Robertus filius Reginaldi occidit Samsonem filium Aldithe quodam cni pulo et fugit;' 'Hugo Roller percussit Marcum Aventure quodam cni pulo in reditu de quadam cervisia [ale in the sense of feast] ita quod ipse obiit de plagis;' these are typical entries of the simplest kind, found by opening the book almost at random. Slaying, wounding, flight of slayers or suspected persons, fines imposed on townships, tithing-men, and pledges, deodands for deaths by misadventure, now and then a trial by battle, with mention of the barbarous sentence on the vanquished party; such are the staple contents of the record transcribed and printed by Mr. Maitland.

The text comes from two rolls preserved in the Record Office, of which a concise but sufficient critical account is given in the Introduction, otherwise a most interesting and scholarly piece of work. Doubtless we shall recur more than once in this Review to the matters discussed or touched upon in it, and more or less elucidated by every fresh publication of documents belonging to the first half of the thirteenth century, the most critical period in the development of the Common Law and its procedure. When Mr. Maitland can say, and truly say, that 'the history of English Law, and in particular the history of the petty jury, is still in MS.,' there is enough investigation yet to be done to last our time. If the Inns of Court (that is, their present anomalously constituted governing bodies) took anything like an adequate view of their duty to the profession and the public, these things would not be left to the private enterprise of a few scholars, some of them (to their praise and our shame be it said) neither lawyers nor Englishmen. Not the least curious of our nineteenth-century sights for gods and men is Professor Vinogradoff of Moscow discovering Bracton's notebook in the British Museum, amid the profound indifference of English lawyers. Meanwhile we must be the more thankful to an English lawyer who, like Mr. Maitland, does not amid the business of his profession forget that it is a science as well as a business, and a science interwoven with the history of civiliza-

tion itself. This first published work of the newly elected Reader in English Law at the University of Cambridge may be taken, let us hope, as an earnest of what both our Universities (rich as they both of them are in unexplored MS. treasures) may ere long accomplish in this kind.

F. P.

*De la forme dite 'Inokosna' de la famille rurale chez les Serbes et les Croates.* Par V. BOGIŠIĆ. Paris, 1884. 8vo. 49 pages.

THE object of this tract is to call attention to facts in the South-Slavonian type of family law which have been hitherto neglected not only by writers on the subject, but in local legislation. Three types exist (apart from the complications caused by Mahometan law in the case of Moslemized Slavs): namely, the composite family of several households of the same generation dwelling in common (*zadruga*), the single family under one ancestor (*inokosna*), and the 'urban family,' which is just like a family in Western Europe, and, as far as its mere composition is concerned, is like the *inokosna*. The head of the *zadruga* is not a proprietor, but only an administrative chief, liable to be deposed, and subject to the claim of any adult male member of the community to partition of his share. Succession on death, in the sense of Roman and Western law, is unknown. The 'urban family' is on these points like the Roman or West-European family, and thus radically different from the *zadruga*, which on the other hand is strikingly like the Joint Family of Hindu law. Now the *inokosna* or *inokoština* has been commonly assimilated, both by text-writers and legislators, to the 'urban family.' M. Bogišić affirms, from his own knowledge of Montenegro and Herzegovina, that this is a mistake. The *inokosna* is really a simpler form of the *zadruga*; it consists of only one household, or rather group, but the customary rules as to the powers of the ancestor, an adult son's right to call for partition, &c., are, *mutatis mutandis*, the same as in the composite family. M. Bogišić further shows that the popular use of the word *zadruga* and its cognates does not bear out the technical and exclusive meaning put upon it in books. In his own words: 'La plus grave erreur commise à ce sujet a donc été, à notre avis, d'attribuer *exclusivement* à l'union de plusieurs familles dans une maison le caractère d'association, de collectivité économique propre à notre famille villageoise et de le refuser à la famille où ces rapports *interfamiliaux* n'existent pas.'

Practically, the conclusion is to warn the princes and rulers of South-Slavonic folk against errors of the kind which have now and again been committed, with the best intentions, by British legislators and settlement officers in India. From a scientific point of view we need not insist on the importance of having verified and living examples of a type intermediate between the Joint Family and the Urban Family, or ordinary individual family of Western

Europe; resembling the former in its institutions, the latter in its component parts; capable of easy transformation into the 'urban' type, and still more easily confounded with it by outside observers before the transformation has really happened.

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*Marcus Aurelius Antoninus.* By PAUL BARRON WATSON.  
New York: Harper & Bros.; London: Sampson Low & Co., 1884. 8vo. pp. x and 338.

ABOUT sixty pages of this book are given to an account of the legislation and law reforms of Marcus Aurelius, the only full and continuous one, we believe, that has ever appeared in English. Historical students of Roman law will find it useful for reference and as a guide to the authorities.

Mr. Watson's interpretation of his text, however, cannot always be safely accepted. He is ever zealous for the honour of his hero (though the ruler whose virtues could warm Gibbon almost to enthusiasm assuredly stands in no need of excessive commendation), and his zeal is not always according to knowledge. In other things Mr. Watson writes like a scholar; but he does not seem to be familiar either with Roman law generally or with the Latin of the Digest. Hence some curious misunderstandings.

'The compilers of the Digest have preserved a letter in which Marcus recommends that a slave, who under torture had confessed a crime of which he turned out afterwards to be innocent, should be set at liberty in recompense for the indignity he had suffered.' The reference is to D. 48, 18, 1, 27: where, instead of the pretty story related by Mr. Watson, we find a runaway slave accusing both himself and others in order to get permanently free from his master; the slave is convicted on his own confession, but execution respited for examination of and concerning the alleged accomplices; this examination proving the tale false, the Emperor's decision is that the slave had better be sold under the direction of the court—*per officium distrahi*—a rather different thing from being set at liberty. The only person to be recompensed is the master, who is to get the slave's price, but not be at liberty to buy him back. There is an even more extraordinary mistranslation of D. 25, 3, 5, 14. 'You have no claim upon your father for that which the sentiments of humanity command you to furnish your daughter, even though *his* father did pay the expenses of educating him' does not represent either the grammar or the sense of 'Non impetrare debes ea quae exigente materno affectu in filiam tuam erogata esset etiamsi a patre suo educaretur.' Oddest of all perhaps is the extraction of paternal philanthropy from a rule which may have been sound economy, and in the long run true humanity, but is in fact directed against the spending of public money in disguised alms. 'Minime aequum est decuriones civibus suis frumentum vilius quam annona exigit vendere' (D. 48, 12, 3, pr.) becomes in Mr. Watson's hands, 'Marcus Aurelius declared it illegal for the

*provincial senate* to offer grain of an inferior quality to that furnished by the *praefectus annonae* in Italy.' It is not a matter even of law Latin that *vilius* in connexion with *vendere* cannot mean anything but 'cheaper.' Comparing the more clearly expressed statement in D. 50, 1, 8, the result seems to be that local authorities were neither bound nor entitled to apply municipal funds in selling grain to the citizens at a loss. There is no reason to take *annona* for anything but the current market price.

It is a simpler feat, but verging on simplicity in another sense, to discover deep motives of humanity in a fugitive slave law of the most commonplace kind, and to admire the condescension of a prince who 'did not by any means confine himself to questions of universal justice, but often spent his time in the bare interpretation of the Roman law,'—of which law he was the supreme official interpreter; as if one should express infinite obligation to the House of Lords for graciously entertaining an appeal on the construction of a statute. Not every one that prints *u*'s for *v*'s, and spells Vergil with an *e*, can safely attack Roman law texts without due training. It is a pity that Mr. Watson did not get these pages revised by some competent civilian; and the more so because in other respects (of which we cannot in this Review take particular notice) his book has a good deal of merit.

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*Leading Cases on the Law of Torts. With Notes.* Edited by W. E. BALL. London: Stevens & Sons, 1884. 8vo. 494 pages.

MR. BALL'S volume of *Leading Cases on the Law of Torts* is in substance an English edition of Mr. Melville Bigelow's (Boston, Mass., 1875). 'The selection of leading cases,' says Mr. Ball, 'is nearly the same as Mr. Bigelow's, and I have incorporated such of his notes as related to modern English law, and appeared to me to be useful from the point of view of the English practitioner.' It would have been more graceful, not to say more frank, to retain Mr. Bigelow's name on the title-page; but Mr. Ball's acknowledgment is in terms sufficient. Comparison of the two books shows the English editor's changes to be as follows.

Mr. Ball has given in full as leading cases a certain number of English decisions which are not in Bigelow. He has likewise added notes of his own in which the results of other decisions are stated and discussed. These notes appear to be careful and useful: and to say that we do not always agree with Mr. Ball is merely to say that in the law of torts many things are still difficult and doubtful. For example, the more we reflect on the doctrine of *Lumley v. Gye*, 2 E. & B. 216 (notwithstanding its confirmation by the majority of the Court of Appeal in *Bowen v. Hall*, 3 Q.B.D. 333), the less are we satisfied with it: on the other hand, we do not share Mr. Ball's doubts as to the correctness and authority of the decision in *Barwick v. English Joint Stock Bank*, L.R., 2 Ex. 259. But there is

room enough for difference of opinion on both points. In some cases Mr. Ball's additions are meagre; thus he gives only one very compressed paragraph to the Employers' Liability Act, and does not refer at all to the decisions upon it. Sometimes, also, Mr. Bigelow's references to cases which at the time of his publication were not accessible to him in the Law Reports have not been completed by Mr. Ball, as they might and should have been. It is not satisfactory to find so well-known a case as *Peek v. Gurney*, decided and reported more than ten years ago (1873; L. R., 6 H. L. 377), cited only from the Law Journal.

So much for the additions. In omissions Mr. Ball has gone to work in a sweeping fashion, so sweeping as gravely to detract, in our opinion, from the value of his work. First, he has omitted almost the whole of Mr. Bigelow's historical notes. Now Mr. Bigelow's exposition is not infallible, nor his scholarship always above suspicion. But he has collected with great industry, and set forth on the whole in a clear and convenient manner, a considerable mass of learning which is of no small use to historical and scientific students of the Common Law. Mr. Ball has no doubt gained space by leaving out all this, and perhaps thinks it makes the book look more practical. We think the gain (if any) is too dearly bought.

Next is a more serious matter. For some reason we cannot understand Mr. Ball has not only substituted English cases for the American cases given at large by Mr. Bigelow, but he has struck out wholesale the references to American cases in the notes. This we cannot but think a capital error. As a matter of saving trouble, it would have been quite as easy to reprint Mr. Bigelow's cases and references, or the more important of them, with a warning that the English editor did not undertake their criticism or verification. And it so happens that in several departments of the law of torts the best American authorities are particularly instructive. The rules of a master's liability for the negligence of his servants, and the limitation of that liability when the party injured is a fellow-servant, have nowhere been so clearly stated as by Chief Justice Shaw of Massachusetts in *Farwell v. Boston and Worcester Railroad Corporation*, which Mr. Bigelow very properly gave as a leading case. Not only the text of this judgment, but all reference to it, disappears in Mr. Ball's work. We are far from wishing to encourage the indiscriminate citation of American cases; but there is no wisdom in running into the opposite extreme and throwing them away when they are given to one's hand.

The result is that, while Mr. Ball's book may be found acceptable as a supplement to Mr. Bigelow's, it will not supersede it even in this country. And, having regard to the scant courtesy with which Mr. Bigelow has been treated in the appropriation of his work, we cannot pretend to desire any such result.

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*The Law of Trade Marks and their Registration, and matters connected therewith, including a chapter on Goodwill, etc.*  
By LEWIS BOYD SEBASTIAN, B.C.L., M.A., of Lincoln's Inn, Barrister-at-Law. Second Edition. Stevens & Sons, 1884. 8vo. 560 pages.

MR. SEBASTIAN has considerably expanded his book from the first edition of 1878. The result is a careful and well-digested text-book on the law of trade marks and the closely related topics. No pains have been spared to exhaust every source of information and authority within the scope proposed. For English cases he has not only ransacked the ordinary reports, but has from time to time collected from sources for which he vouches—in many cases from his own notes taken in Court—a large number of otherwise unreported cases. Of these the cases prior to 1879 will be found in his Digest of Trade Mark Cases published in that year. Of the later ones brief particulars are to be found in the notes to the present book. The American Reports have been well searched, and are used not without discrimination. Scotch and Irish decisions receive a fair share of attention; and even decisions of the Scotch Sheriff Courts—as selected for publication in the Scottish Journal of Jurisprudence—have been utilised. It may be remarked by the way that the written decisions of these *judges ordinary*—who have unlimited jurisdiction (subject to appeal to the Court of Session) in questions relating to personal property—are likely to be sound and carefully reasoned. Contributions are also levied from the decisions of the High Courts in Calcutta and Bombay; and those of the Supreme Court in Victoria are not neglected.

From this considerable mass of authority, embracing over 1000 cases, the essence is compressed within a moderate compass. The principles of the law are clearly laid down and the matter skilfully arranged; so that the reader is not bewildered, as is the case in too many text-books, with a congeries of ill-assorted and contradictory *dicta*. The author is not indeed absolutely free from the usual propensity of text-writers to quote the language of a judge after the manner of an orthodox divine citing Scripture; but the quotations are in general appropriate, and not without coherence with the text in which they are incorporated. He is not, on the other hand, afraid to state his own opinion on a comparison of conflicting doctrines. Thus after showing (p. 54) that an ordinary adjective, descriptive of quality, cannot be appropriated as a trade mark; he cites American cases in which this doctrine has been extended so as to exclude a device indicating that the goods were manufactured by a particular firm *as well* as that they were of the best quality made by such manufacturer; and shows that the English rule which admits of a trade mark having this double significance is the more reasonable and convenient.

In regard to the language in which the principles of the law have



been expressed, the author might perhaps with advantage have adopted a more critical attitude. For example, he constantly uses the word 'fraud' as denoting something which does not necessarily imply *fraudulent intention*. At p. 156 he says: 'Even though it be admitted that the Law of Trade Marks is based upon a right of property, fraud also is necessary to entitle the owner of the trade mark to redress. But the fraud does not consist in an intention to deceive on the part of the defendant, but in an actual deception, or in the creation of a probability of deception, independently of any fraudulent intention.' As authority for the first proposition in this passage he cites the judgment of Sir G. Mellish in *Singer Manufacturing Co. v. Wilson* (2 Ch. D. 434-53). Sir G. Mellish however does not use the word 'fraud' but 'false representation,' while he explains that Courts of Equity interfere although the thing was done *perfectly honestly*. The language of Sir G. Mellish is not above criticism; and it may not be difficult to find respectable judicial authority for the author's use of the word 'fraud.' It is, indeed, easy to understand from the history of the development of the Law of Trade Marks, as well as of the doctrine of 'representation' in Courts of Equity, how the word 'fraud' came to be thus loosely applied in discursive judgments. But this inaccurate use of the word is carefully avoided by most, and has been energetically protested against by at least one, of the highest judicial authorities<sup>1</sup>. There is no excuse for its admission into a text-book. The author's meaning in the above passage might have been, without misuse of ordinary language, expressed as follows: 'Although the Law of Trade Marks is based upon a right of property, it is also necessary, in order to entitle the owner to redress, to suggest a case of actual or probable deception—with or without the intention on the part of the defendant to deceive.'

The Appendices consist of (A) The Patents, Designs, and Trade Marks Act, 1883 (so far as relates to trade marks), and the relative Rules and Instructions of the Board of Trade; (B) A very full and valuable collection of Forms and Precedents; (C and D) Various statutory enactments with regard to marks on goods; (E) The Statute Law of the United States and a copy of the treaty between that country and our own for reciprocal rights, including the most favoured nation clause, in everything relating to property in trade marks and trade labels. Prefixed to the volume are also the international arrangements for protection in patents and trade marks adopted (under the powers of the 103rd section of the Act of 1883) by Order in Council of 26th June, 1884. The Index is adequate. In a word, the book is a complete compendium of the Law of Trade Marks; and will be most useful either as an aid to the lawyer, or a handbook for the trader who would fain dispense with a lawyer's assistance.

<sup>1</sup> See judgment of Bramwell L. J. in *Weir v. Bell*, 3 Ex. D. 243, and of Lindley L. J. in *Smith v. Chadwick*, 20 Ch. D. 27, 79; and the speeches of the Law Lords in same case, 9 App. C. 187.

*The Patents, Designs, and Trade Marks Act, 1883, with the Rules and Instructions, etc.* By J. E. CRAWFORD MUNRO, LL.M., etc., of the Middle Temple, Barrister-at-Law. 8vo. 429 pages.

THE scope of Mr. Munro's book is confined to editing the Act, with the relative Board of Trade Rules and Instructions, adding an introduction and notes strictly confined to the matters comprised in the various sections of the Act, and Appendices containing forms of pleading and injunction orders, and conveyancing precedents.

With the substantive law of patents and trade marks—which, generally speaking, remains unaltered by the Act—he does not profess to deal fully; so that important questions, such as novelty and subject-matter of a patent, and the nature of the right protected or of the invasions restrained, are only slightly handled.

The introduction succinctly explains the object and scope of the Act of 1883, and the changes made in the previously existing law. An account of these changes necessarily affords scope for variance of opinion; and Mr. Munro has perhaps attached undue weight to the requirement (sec. 5 of the Act) that the complete specification must 'end with a distinct statement of the invention claimed.' He adds (p. xlvi) the comment, 'and be not as heretofore chiefly used for the purpose of disclaiming what is old.' And (on p. 8) he makes a somewhat similar comment, referring to *Plimpton v. Spiller*, 6 Ch. D. 426. All this implies that not only must the formal claim at the end of a specification contain something more than the claim at the end of a well-drawn specification in the form usual before the Act, but that this formal conclusion may have a totally novel importance in the construction of the patent. The suggestion is startling; and the point may arise for decision sooner or later. In the meantime it seems reasonable to prefer the view that this clause of the Act is merely directory, and intended to lead to uniformity in the style of specifications; but not to add a new pitfall in the way of honest patentees.

The notes which are appended to the various sections of the Act, as printed in this book, consist of illustrations by reference to cases in the English Courts, in which the gist of each decision is briefly and clearly stated. Of the Appendices, perhaps the most useful and complete is that containing precedents for the conveyancer who has to deal with rights of patent, design or trade mark, and good-will. To this Appendix is added an Index to other precedents of the like nature to be found in various books. The General Index is ample and carefully framed.

*The Law and Practice in Bankruptcy under the Bankruptcy Act, 1883, and the Rules and Forms, with Notes.* By E. COOPER WILLIS, Esq., one of Her Majesty's Counsel, assisted by A. R. WHITEWAY, Esq., Barrister-at-Law. London: Stevens & Sons. 8vo. 709 pages.

The importance of the Law of Bankruptcy is little likely at present to diminish in this country; yet it might well be asked

whether there is room for all the treatises on the subject which have recently issued from legal printing-presses. In the keen competition of legal authorship now existing moderate merit cannot meet any success; mediocrity is no more allowed to legal writers now than it was in the time of Horace allowed to poets.

In this however, as, we apprehend, in every other branch of literature, there is room for a really good work, and we are fortunate in finding that the present treatise is one of this character. Both the method and the matter of the volume are, in our opinion, deserving of the highest praise. The Act is given *in extenso*, with a commentary upon each section. This commentary, so far as we have tested it (and we have taken some pains to do so), has the rare merit of being neither defective nor redundant. It tells the reader what he is likely to want to know, without shirking difficulties on the one hand, and without a parade of obsolete case-knowledge on the other.

Critics must be critical, and we shall therefore be pardoned in saying that we should sometimes have liked important changes made by the new Act more emphasised by the author: thus we should have thought it better to call special attention to the novelty and importance of the provision enabling a debtor now to present a bankruptcy petition against himself (*op. cit.* p. 32). We should also have liked to have had the author's opinion on many other subsidiary points, such for instance as the amusing little point arising under section 17, sub-sec. 3 of the Act as to who is sufficiently 'a representative authorised in writing' of a creditor, and whether his counsel must be armed with such authority, or is sufficiently the *alter ego* of his client without it.

We should further have liked to have had the views of the author as to the arrangements which it is an open secret are now frequently made outside the Act. According to one authority, 'The bankruptcy of the country is being worked outside the Bankruptcy Act<sup>1</sup>.' This opinion is probably somewhat exaggerated, but it represents nevertheless a reality, and it is probable that the reduction in the number of public failures is owing more to dislike of the present bankruptcy procedure and a consequent recourse to modes of private arrangement than to any improvement of credit. The legal pendulum is ever oscillating in bankruptcy between a *laissez faire* policy in which everything is left to a body of creditors too often careless and apathetic, and an officialism which is irksome alike both to debtors and creditors. The present Bankruptcy Act is an extreme illustration of the latter, and this, combined with an illiberal scale of remuneration to practitioners and an increased scale of fees to officials, has rendered the Act unpopular in working.

But this is not the place to discuss at length the policy of the law; and returning once more to the volume before us, we note

<sup>1</sup> Quoted by Mr. Saunders, the President at the recent meeting at Birmingham of the Incorporated Law Society.

that Mr. Willis sometimes treats suggested questions with an air of authority somewhat unusual. This would be unbecoming in a less well-known lawyer, but is quite consistent with the standing and position of Mr. Willis. Further, in more than one case he gives the benefit of his personal knowledge as to questions decided by the Court but not made the subject of any published report (see *op. cit.* p. 46). There is sometimes a dry humour observable in the author's criticism, as, for instance, in relation to *Ex parte Sharpe* (L. R., 16 Ch. D. 655); and again in his reference to the discharge of debtors (*op. cit.* p. 130). Probably he is a believer in the old maxim—

‘Ridiculum acri

Fortius et melius magnas plerumque secat res.’

It remains to add that the work is supplied with a good index, and that by reference thereto it is easy to find a desired subject. Altogether the work is one which should become, if it be not so already, the standard work on Bankruptcy Law.

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*The Law of Estoppel.* By LANCELOT FEILDING EVEREST and EDMUND STRODE. London: Stevens & Sons, 1884. 8vo. 499 pages.

THIS book halts uncomfortably between two opinions. In order and arrangement it is an expansion of the well-known note in Smith's leading cases to the Duchess of Kingston's case. The authors follow their precedent in taking as the thread of their discourse the classification of Lord Coke, and adhere to their text so closely that they insert appendices containing an account of the arguments and judgments in the Duchess of Kingston's case and of the nature of the jurisdiction of ecclesiastical courts, whose bearing upon the law of estoppel is not otherwise apparent. At the same time they are not content to make this book a mere mass of cases strung together upon the first thread found convenient, but in parts of their subject they aim at and have largely succeeded in a more scientific treatment by logically arranged propositions and illustrations. Lord Coke's division however does not lend itself to this treatment, for it brings into undue prominence the technical and obsolete aspects of the law, and leaves the all-important modern doctrine of estoppel by conduct and representation (which is the best part of the book) to be tacked on as an apparent afterthought. The authors have not wholly succeeded in reducing a tempting subject into a reasonable form. They have brought together much good material, but more work is needed to digest that material into a valuable book. They have not followed out the suggestive remark of Bacon, V. C., that the Common Law doctrine of estoppel was a device to which the Common Law Courts resorted at a very early period to strengthen and lengthen their arm, and by their special pleading tactics to obtain the power which the Court of

Chancery exercised without foreign assistance. They are content to array solemnly authorities and dicta from Lord Coke to Lord Bramwell for and against the formal proposition that estoppels are odious. They leave unexplained the distinction between the technicality by which men were entrapped by formal statements and unguarded admissions, and the sound and reasonable principle that men should be enabled and encouraged to put faith in the conduct and statements of their fellows.

To come to detail, their work is not always satisfactory. For example, at p. 214, where they are bold enough to dispute the assertion of the late M. R. that an estoppel cannot arise on a covenant, they produce a set of cases which in no way support their position. Again, at p. 2, the only definition which they give of an admission is as follows: 'One difference [between an estoppel and an admission] is that admissions can be made use of by persons who were not parties to the action in which such admissions were made, whereas estoppels are only binding on the parties and their privies.' They ignore that admissions are not confined to statements made in the course of an action. They confuse the subject by not stating the general principle that every declaration made by a man anywhere and at any time is evidence against him as an admission, while only special classes of admissions are conclusive against him as estoppels. They plunge instead into the highly technical question whether a deposition by one of the plaintiff's witnesses taken under the old system in Chancery is to be treated as if it was a statement by the plaintiff. Upon points such as these further thought is needed.

The book is well printed, and has the great advantage of a good index and an excellent table of cases, in which the date and a variety of references are given to each case.

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*The History of the Laws affecting the property of Married Women in England (being an Essay which obtained the York Prize in the University of Cambridge).* By B. E. LAWRENCE, M.A., LL.M., of Trinity College, Cambridge, and Lincoln's Inn, Barrister-at-Law. London: Reeves & Turner, 1884. 8vo. 183 pages.

THIS book is a very careful compilation of materials, and doubtless for this the author is entitled to credit; but it is neither a history nor an essay. We are accustomed in a history to look for a narrative of the causes of events, of the agents by which the events were brought about, and of the influence of particular circumstances upon national characteristics. In an essay we expect a compact and easy-flowing piece of literary work, with the outlines of the subject clearly drawn. But in this book we find that the bulk of the material consists of citations from the recent and well-known statutes relating to married women, or bare statements of the results

of particular judicial decisions, without the links between them being indicated. As to how these statutes came into being, as to the influence of particular judges on the law, nothing is said. For example we take at random this passage from p. 65: 'In 1844 it was decided that the affidavit of a married woman was sufficient if sworn (where she was residing abroad) before an officer whom the certificate of a notary public certified to be a person empowered by law to take affidavits.' This might be all very well in a technical book of practice, but this and similar passages one after the other are scarcely what we expect to find as the main part either of a history or an essay. We have by no means forgotten the little passages at the beginning of the chapters in which the author deals with the earlier history of his subject. Thus after stating that the doctrine of conjugal unity did not apply so strongly to real as to personal property, the writer gives the reason of it: 'It appears at a first glance difficult to account for this discrepancy between the wife's personalty and the wife's realty; but the answer' (explanation rather) 'is that originally the doctrine of conjugal unity in all probability applied equally to personalty and to realty.' The answer itself seems to us to require a good deal of explanation. There are also various vague statements as to the law in Anglo-Saxon times, which are wholly unsupported by any authorities; as indeed was natural, for, as the late Mr. Green says, the laws in those times in regard to family matters were almost entirely oral. In such a work as this it is better not to endeavour to throw light on subjects which men of great research and ability with special knowledge of the times have considered must be more or less matter of conjecture. Some University prize essays have been developed into works of permanent value; but Mr. Lawrence has apparently underrated the amount of thought and trouble necessary to produce this result.

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*The Law of Husband and Wife within the Jurisdiction of the Queen's Bench and Chancery Divisions.* By MONTAGUE LUSH, of Gray's Inn, Barrister-at-Law. London: Stevens & Sons, 1884. 8vo. 553 pages.

It is doubtful if the publication of this book was altogether opportune. The law in regard to the legal relations of husbands and wives is in a distinct state of transition. For there are a certain number of marriages now governed by the law as laid down in the Married Woman's Property Act of 1882, and a very large but diminishing number subject to the law as it existed before the passing of that Act. This older law is pretty well known and hardly requires a new treatise, and the newer law has not yet been sufficiently interpreted by judicial decisions to make a commentary on it of much value to practitioners. The consequence therefore is that a text-writer has to fill a good many of his pages with conjectural comments which, however intelligent, are really of little

practical use. Examples of this kind of writing are to be seen on pp. 248, 249, and 358, among others. The danger of it in a work of this class is exemplified on p. 434, where it is stated that a covenant by a husband to settle after-acquired property on his wife to which he may become entitled in her right will have no operation, because it will belong to her as her separate property. This statement, as the author mentions in the Addenda, has been so to say overruled by Pearson, J., in the case of *Re Stonor's Trusts*, L. R., 24 Ch. D. 195. This is the most serious adverse criticism which can be made in regard to Mr. Lush's work, for, looked at without regard to extraneous circumstances, there is no doubt that it is a carefully and clearly written text-book, though somewhat too diffuse in having so many sections of recent statutes printed at length. As good a piece of the book as any—perhaps indeed the best piece—is the chapter on 'Agreements for Separation,' in which the historical part of the subject is sufficiently indicated; and it is shown how judicial opinion, from at one time altogether refusing to sanction such agreements, has now come to look on them with favourable eyes; a change which is also sketched with his usual forcibleness of expression by the late Sir George Jessel in *Besant v. Wood*, and which was not a little influenced by the decisions of Lord Westbury in *Hunt v. Hunt* in 1861. After this indication of the alteration in the policy of the law, the state of it as it now exists is clearly shown, and the conflict of judicial opinion as to the effect of a dissolution of marriage on agreements for separation, so far as regards covenants in them by the husband to pay an annuity to the wife, is pointed out and considered. In so doing the writer comments adversely on the case of *Charlesworth v. Holt* (L. R., 9 Ex. 38), in which it was held that after a dissolution of a marriage on the ground of the wife's adultery the husband was still bound by his covenant in a separation deed to pay the wife an annuity. It is impossible to criticise a criticism justly without pointing out all the salient features of the case, but we may observe that the main part of the covenant was that the husband would pay an annuity to his wife during their joint lives 'so long as they should live separate and apart.' Mr. Lush's reason for disagreeing with this decision is, to put it shortly in his own words, because 'the words should be construed as meaning so long as they (the husband and wife) continue to forego the right of compelling cohabitation, i. e. so long as the voluntary separation (which was contemplated) continues.' The main object of separation deeds being in most cases to prevent the exposure of private affairs before a court of law, one main reason for entering into it is gone if after a separation deed a husband is obliged to take legal proceedings against his wife. This however is but one of the many interesting and important points which are discussed in this volume.

*Les Effets de Commerce dans le Droit Anglais.* By THOMAS BARCLAY, of Lincoln's Inn, Barrister-at-Law. Paris: Durand et Pedone Lauriel, 1884.

*The French Law of Bills of Exchange.* By the same Author. Waterlow & Sons, 1884.

*Émancipation contractuelle de la femme Mariée en Angleterre.* By the same Author. Paris: Durand et Pedone Lauriel, 1883.

MR. BARCLAY, as an English barrister domiciled at Paris, and also in his capacity of 'secrétaire international' of the Association for the Reform and Codification of the Law of Nations, speaks with authority on matters of Comparative Law.

The book first above-named is an excellent analysis for French readers of the Bills of Exchange Act, 1882. The provisions of the Act are carefully compared, not only with those of the French code, but with those of the Scandinavian, German, Italian, Swiss, and other codes. It is on the whole to be observed that the differences between the rules of European nations on this subject are neither numerous nor essential, and that it would not, as things now stand, be difficult to extract therefrom a general code not very repugnant to the practice of any.

Mr. Barclay, however, notices a certain difference between the French and English theories of Bills of Exchange, leading to some differences in practice. The French law adheres to the more primitive view of a bill, namely, that its legitimate object is to avoid the transmitting of coin between places at a certain distance from each other. Consequently the French law requires, though not apparently very rigidly, that the place where the bill is drawn and the place where it is payable must be specified and at a certain distance apart. From the same point of view a bill is, in French law, merely evidence of debt; in England, so strong is the presumption of value received, a bill is more akin to a deed than to a simple contract, and is in fact very nearly the debt itself. The Germans take a view still more spiritual — no doubt that which will prevail in the future — and look upon a bill of exchange as 'ein für sich bestehendes Rechtsverhältniss,' a relation standing on its own feet.

The *aval* seems to be an useful institution unknown to English law. This is a special guaranty of any one party to a bill by a third person, who does not thereby, as he would in England, incur all the liabilities of an indorser and become the guarantor of all subsequent parties.

Mr. Barclay's separate sketch of the French law on this subject, written in English, should be useful to English merchants and lawyers. The Preface gives a clear summary of the main points of difference between the French and English law, and a parallel table



of reference between the provisions of the Bills of Exchange Act and the corresponding provisions of the French code is annexed.

The same author's '*Emancipation contractuelle de la femme mariée en Angleterre*' sets forth for the benefit of French students the Married Women's Property Act of 1882, prefaced by a slight historical sketch of the triumphant march of woman in England. Mr. Barclay reminds us that the legal capacity, if not the moral power, of woman is now greater in England than in most countries. '*Il doit suffire de dire qu'en général, sur le continent, le mari est le chef de l'union conjugale, qu'il administre les biens de sa femme, que celle-ci est incapable d'ester en justice et de contracter, qu'enfin l'omnipotence du mari est consacrée.*'

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*Town and County Government in the English Colonies of North America.* By EDWARD CHANNING, Ph.D. [In John Hopkins University Studies.] Baltimore, 1884. 8vo. 57 pages.

FOR the present we barely take note of this careful study in the natural history of institutions, which deals with the fortunes of English local government as transplanted to Massachusetts and Virginia. The conclusion is to the effect that 'town and county government in the English colonies were not so unlike as is commonly supposed,' and 'were *both* the survival of the English common law parish of 1600.'

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*Real Property Statutes, comprising those passed during the years 1874-1884 inclusive; consolidated with the earlier Statutes thereby amended. With copious notes.* By HARRY GREENWOOD. Second Edition by the Author, assisted by LEES KNOWLES. London: Stevens & Sons, 1884. 8vo. 661 pages.

THE motto of this work should be that which Hallam is said to have proposed for the Statistical Society, '*Aliis exteendum*,' under a sheaf of corn. It is no doubt very convenient to possess in a portable form, with plenty of cross references, and in a readable type, the real property statutes which have been passed since the publication of the last edition of Shelford. This Mr. Greenwood supplies. He has been diligent in citing the very latest decisions, and has given us in his Table of Cases references to all the Reports which contain his authorities. The nature of the case prevents us from expecting, nor do we find, in his notes either the copious illustrations of the law which the notes to Carson's Shelford contain, or the ingenious speculations on the effect of the later statutes which the works of Messrs. Clerke and Brett, Robbins, and Hood and Challis afford. Mr. Greenwood's book will be more useful to the practitioner than to the student.

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*The Annual Practice, 1884-5.* By THOMAS SNOW, HUBERT WINSTANLEY, and JOSEPH WALTON, assisted by THOMAS CLARKSON. London: William Maxwell & Son, and Henry Sweet. 8vo. 1145 pages.

THIS copious repertory is notable among the products of continuous industry by which alone the state of lawyers is made tolerable under the burden of statutes, rules, and practice cases (most of which would be much better left unreported). In the present edition the authors have just had time to include the Rules of Court of October 1884. The only critical remark that occurs to us is that, if text-books of general law are cited at all in a work of this kind, it seems desirable to cite them from the latest edition.

*The Law relating to Copyright and Trade Marks, treated more particularly with reference to Infringement, forming a Digest of the more important English and American Decisions, together with the practice, etc.* By JOHN HERBERT SLATER, of the Middle Temple, Barrister-at-Law. Stevens & Sons, 1884. 8vo. 466 pages.

MR. SLATER has produced a book in two parts; the larger relating to Copyright and the smaller to Trade Marks. He has collected and more or less digested a large number of cases, both English and American; but the 'careful analysis of principle' promised in the preface is not apparent in the body of the work. By the aid however of the Index, which is the best arranged part of the book, the practitioner will find the clue to the decisions on any required point. The Appendices contain (A) forms of Information, Pleadings, and Notices, including a considerable number of forms of Orders for Injunctions; and (B) Statutes relating to Copyright and Trade Marks.

*The Patentee's Manual; being a treatise on the Law and Practice of Letters Patent, especially intended for the use of Patentees and Inventors.* By JAMES JOHNSON, of the Middle Temple, Barrister-at-Law; and J. HENRY JOHNSON, Solicitor, Assoc. Inst. C.E., Past President of the Institute of Patent Agents. Fifth Edition. Longmans, Green & Co.; Stevens & Sons, 1884. 8vo. 489 pages.

THIS is a good sound practical work. Though primarily designed as a guide to inventors and patentees, the lawyer will find in it a well-arranged compendium of the principles to be kept in view in advising upon the application for a patent, or upon the construction and effect of the patent when granted. The Appendix, besides the Statutes and Rules, contains a carefully-framed summary of patent laws of foreign countries.

## Notes on Current Cases.

*Foakes v. Beer*, 9 App. Cas. 605, is noteworthy on more grounds than one.

(1) It absolutely determines a principle of law which has for more than two centuries and a half been the subject of doubt and criticism, namely that an agreement not under seal made by a creditor to accept a smaller sum in lieu of an ascertained debt is *nudum pactum* and therefore void.

(2) The argument and the judgment clearly establish that the principle affirmed rests in reality not, as is often supposed, on *Cumber v. Wane*, 1 Str. 426, but on an unnecessary dictum in *Pinnel's case*, 5 Rep. 117 *a*. It is, moreover, apparent that their lordships would have been glad to escape from the necessity of affirming a doctrine which often leads to inconvenient and unjust results.

(3) The fact that the House of Lords did affirm the doctrine laid down in *Pinnel's case* is as striking a proof as can be found of the weight wisely given by English courts to authority. A dogma of Coke's resting (it may be) originally upon a misconception of law, has been treated as having in effect nearly the weight of a statutory enactment.

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It takes some boldness to question a judgment of Mr. Justice Hawkins on a matter connected with horse races, and a judgment of Lord Justice Bowen (approved as it is by Lord Justice Fry) on the principles of the law of agency. Is it however at all certain that the decision of the Court of Appeal in *Read v. Anderson*, 13 Q. B. D. (C. A.) 779 can be supported? Stripped of its details the case is simple enough. *X* employs *A* to make bets for *X* in *A's* name, and impliedly agrees to repay *A* for bets made and paid on *X's* behalf. *A* acting on *X's* instruction bets with *M* on a horse race and loses the bet; before the bet is paid but after it is lost *X* revokes *A's* authority to pay it; *A* pays the money and thereupon sues *X* for the amount. It is admitted on the one hand that *M* could not by any legal process have recovered the amount of the bet from either *A* or *X*, and on the other hand that if *A* had not paid the bet he would have suffered in his business and reputation as a betting agent. The majority of the Court of Appeal hold that under these circumstances *A* exposed himself to a liability in respect of which *X* as his employer was bound to hold him harmless, and that therefore *X* was not entitled to revoke the authority given to *A*, and *A* was entitled to recover the amount of the bet paid from *X*. The Master of the Rolls, on the other hand, holds that *A's* business, although it may not be illegal, is directly objected to by law, and the contracts made by him in his business cannot be enforced; it is a business of which the law ought not to take notice, and therefore

the inconvenience and the loss which the plaintiff may suffer in his objectionable business form no ground for an action for revoking the authority which the principal ought not to have given.' We venture to think that the doctrine of the Master of the Rolls will commend itself to lawyers. If the law recognises liabilities which cannot be legally enforced results may follow which are as important in practice as they are curious in theory.

Persons interested in the law of domicile should study *Es parte Cunningham*, 13 Q. B. D. (C. A.) 418; 53 L. J. (Ch.) 1067 (C. A.). This case positively decides a point which has several times been discussed in text books, namely that a British subject by entering into the Queen's military or naval service does not thereby lose his domicile of origin. It leaves, however, still open for speculation the enquiry whether an alien, say a German, who enters the Royal service thereby acquires an English domicile. From a practical point of view it is greatly to be regretted that the Bankruptcy Act, 1883, should have given a new importance to questions of domicile. Any person acquainted with the actual operation of (so-called) private international law will unhesitatingly advise legislators to avoid in all Acts of Parliament all reference to domicile. To make rights or liabilities depend upon domicile is to make them in effect depend upon facts which are hard to ascertain, and upon supposed intentions as to residence which are often in the strictest sense unascertainable.

In *Duck v. Bates*, 13 Q. B. D. (C. A.) 843, the Court of Appeal has refused (on grounds of general policy, we think wisely) to add a new terror to the law of dramatic copyright by making private theatricals the subject of legal inquisition. The majority of the Court are careful to point out, however, that the *ratio decidendi* applies only to a case where the performance is genuinely private. The presence of one reporter does not make an entertainment given to the staff of a hospital a public one; but the Court has not decided that the presence of ten reporters would not.

*Weldon v. Winslow*, 13 Q. B. D. (C. A.) 784, settles a point of some importance, though not a very difficult one, on the retrospective operation of the Married Women's Property Act, 1882.

By the same authority the Queen's Bench Division is confirmed in holding that an omnibus conductor is not within the benefit of that fidgety and litigious piece of legislative patchwork called the Employer's Liability Act, 1880: *Morgan v. London General Omnibus Company*, 13 Q. B. D. 832.

*Walker v. Hirsch*, 27 Ch. D. (C. A.) 460, illustrates the danger of relying on general propositions inferred from the use of language covering a wider ground in a former decision on particular facts. Persons who share the general profit and loss of a business are

partners ; but the Court of Appeal has decided that, notwithstanding anything said in *Pawsey v. Armstrong*, 18 Ch. D. 698, persons who enter into an agreement containing a term about sharing some of the profit and loss are not necessarily partners.

Kay, J., dissenting from the decision of Pearson, J. in *Ballard v. Tomlinson* (26 Ch. D. 194), has held that a man is liable for suffering water to percolate (apparently without default on his own part) into his neighbour's cellar. It is curious that, while *Ballard v. Tomlinson* was discussed in the argument, no reference seems to have been made to *Broder v. Saillard*, 2 Ch. D. 692 (Jessel, M. R.), or *Hurdman v. North-Eastern Railway Company*, 3 C. P. D. (C. A.) 168 (Bramwell, Brett, and Cotton, L. JJ.), either of which cases is at least as much in point.

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The following works have been received too late for review in the present number:—

- The Law of Probate.* By W. J. DIXON. 2nd Edition. Reeves & Turner, 1885.  
*The Law of Discovery.* By EDWARD BRAY. Reeves & Turner, 1885.  
*The Law relating to Works of Literature and Art.* By JOHN SHORTT. 2nd Edition. Reeves & Turner, 1884.  
*The Law relating to Gas and Water.* By W. H. MICHAEL, Q.C., and J. S. WILL, Q.C. This (3rd) Edition by M. J. MICHAEL. Butterworths, 1884.  
*The Law of Mortgages.* By CHAS. T. BOONE. San Francisco: Sumner, Whitney & Co., 1884.  
*The Law of Husband and Wife.* By R. THICKNESSE. London: H. Maxwell & Son, 1884.  
*The Law of Marriage Settlements.* By HENRY THOMAS BANNING. Stevens & Sons, 1884.

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Works intended for notice in the next number should be sent to the Editor (care of the Publishers) not later than the third week in February.

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The Contents of Number II (to be published on April 1) will probably include:—

- Early English Equity.* By Mr. JUSTICE O. W. HOLMES, Massachusetts.  
*The Lunacy Laws.* By T. RALEIGH, Reader in English Law, Oxford.  
*Bracton.* By PAUL VINOGRADOFF, Professor of History, Moscow.  
*Liability for the Torts of Agents and Servants.* By the EDITOR.  
*Land Tenure in Scotland and England.* By ROBERT CAMPBELL.
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# THE LAW QUARTERLY REVIEW.

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No. II. April, 1885.

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## THE HISTORY OF THE LAW REPORTS<sup>1</sup>.

**A**MONGST the many law reforms which have been effected during the last twenty years, that of which Mr. Daniel has given us the history is by no means the least important. Considering that the law of this country consists of legislative enactments and of judicial decisions, it certainly does seem remarkable that the collection and publication of such decisions should be left entirely to private enterprise and not be undertaken by the Government of the country. Even Englishmen would think it strange if there were no authentic publication of Acts of Parliament; but the publication of law reports has been so long neglected by the Government that we are all accustomed to it, and are content with such reports as we are in the habit of getting without any assistance from the State.

One thing however we do not get, and perhaps cannot hope for under existing arrangements; and that is, one set of reports which is alone to be regarded as containing an authoritative exposition of the law as declared and applied in the instances reported. But until we have one publication of judicial decisions which, and which alone, shall be received and acted upon as authoritative by our numerous tribunals, all reforms in Law Reporting must be regarded as transitional and incomplete. We have not yet got what we want, but thanks to Mr. Daniel and those who laboured with him twenty years ago, we are in a much better position now than we were then.

Twenty years ago the state of things was intolerable. The reports of the superior courts of Law and Equity and of the Admiralty and Ecclesiastical Courts and of the House of Lords and Privy Council were all commercial undertakings carried on for profit. Competition was excessive, and the profits of each separate

<sup>1</sup> The History and Origin of the Law Reports, &c. By W. T. S. Daniel, Q.C., late Judge of County Courts, &c. London: William Clowes and Sons, Limited. 1884. Large 8vo., 359 pp.

publication were reduced accordingly; whilst the quantity of cases reported was vastly in excess of all reasonable requirements. The reporters were for the most part conscientious men, working under difficulties and often against time, striving to do their best, and producing, many of them, excellent work. But the waste of labour, time and money was prodigious; and instead of having one good set of reports to which all could appeal, professional men were compelled to take in several sets of reports in order to keep themselves fairly *au courant* with what was being decided in the various courts. There were indeed what were called authorised reports, i. e. reports published by reporters to whom greater facilities were given than to their competitors; but these reports were extremely expensive, and were very often greatly in arrear. Moreover, some of these were very inferior to their less favoured rivals. The authorised reports were a necessity to a limited class of men, and had a sure minimum sale. In some cases unfair advantages were taken of this circumstance, and dilatoriness, undue length, and collections of rubbish were the consequence. It cost £30 a year to take in a complete set of the authorised reports, and this did not include binding or any digest. Moreover, no man in practice could do without one or more of the irregular reports which were called into existence by the expense and defects of the authorised series. No wonder the Profession struck and made a vigorous attempt to remedy the evils from which it so severely suffered.

The history of this attempt will be found fully recorded in the work at the head of this article. The old authorised reports, and most, but not all, of the irregular reports, have disappeared; and instead the Profession has, for a small subscription, *first*, a set of reports of all the decisions worth reporting<sup>1</sup> in all the Divisions of the High Court, in the Court of Appeal, and in the House of Lords and Privy Council; *secondly*, short weekly notes of recent decisions; *thirdly*, a copy of the Public General Statutes of the year. In addition to this there has been a digest of cases published every few years, and furnished free of charge to those who subscribed to the entire series of the Law Reports; and last year a chronological table and index to the Statutes was also supplied to them. The reporters are much better paid than they were under the old system; and so financially successful have the *Law Reports* proved, that this year the annual subscription, which was only £5 5s., has been reduced to £4 4s. So far so good. Mr. Daniel, by whom, more than by any one else, this great improvement has been brought about, may be heartily congratulated on his success. Only those who laboured with him and saw behind the scenes can

<sup>1</sup> [If not more.—Ed.]

adequately appreciate the tact, good temper, and perseverance with which he overcame the many difficulties and obstacles he had to encounter. If he had many foes he made no enemies. He did not however work alone; he had valuable assistance from many members of the Legal Profession, and from Messrs. Clowes the printers; and he was fortunate enough to have as one of his zealous supporters the present Lord Chancellor, who was then Attorney-General, and who early took a great interest in the improvement of our system of law reporting.

The leading idea of Mr. Daniel's scheme and of the present system is co operation as distinguished from competition. The various members of the Profession were urged to combine and produce what they wanted for themselves, and not to rely on the efforts of individuals acting without any system and simply with a view to their own interests.

In order to carry out this idea and to consider what ought to be done, a meeting of the Bar was convened in December, 1863, and a committee was then appointed to make inquiries and to report. The committee consisted of twenty-two members. They appear to have held twenty-four meetings. One of their first proceedings was to appoint a sub-committee to ascertain the various methods of law reporting adopted in foreign countries, and the result was a short but interesting report, which is worth preserving, and was as follows:—

'To begin with the system adopted in France. Every judicial decision is required to be in writing, and to be *motivé*, i.e. to disclose on the face of it the grounds and reasons on which it is founded. And when the signature of the President of the Tribunal has been affixed to these solemn judgments, it is the business of the Greffier to see them entered on the register of the Courts, and only one version of them can therefore ever legally appear.

'The records of the tribunals thus containing an authentic version of every decision, the legal profession and the public have at all times access to the register to ascertain what has from time to time been decided, and it is competent for any one to make from the register a selection of such decisions for publication. The collections of decisions by Sirey and Dalloz and Ledru Rollin have been thus prepared. Though these works are deservedly held in great esteem, they are not official publications, any more than any series of English Law Reports.

'In Norway and Sweden the judgments of the ordinary tribunals are always given in writing, and in every case entered on the protocols of the Courts. And in the Supreme Courts of Appeal, where the votes of the Judges are given separately, it is the business of the Registrar of the Court to enter on the records of the Court, not only the final judgment or conclusion, but the grounds and reasons



of the decision of each Judge. Here as in France, therefore, the records of the Court supply ample materials for the preparation of books of reports, or collections of decisions, and such publications are left wholly to free trade.

‘In Denmark, though it is competent for any one to take down, print, and publish reports of cases and decisions of which he has himself taken notes, the only authentic version of judicial proceedings is the entry in the *Dombistocol*, under the hand of the Judge, containing not only the conclusion itself to which the Court has arrived, but the facts and reasons and grounds of the decision; and from these, selections of cases which may serve for precedents are made by the direction of the Courts, though it would seem that other selections made by competent private publishers would be received with equal attention.

‘In Italy, all judicial decisions, whether civil or criminal, must be read aloud in open court, with the grounds in fact or law set out at length; and authentic minutes of the judicial opinions so pronounced are duly entered in the register of the Court; and compilations of the principal decisions of the four superior Courts of Cassation at Milan, Florence, Naples, and Palermo are published by voluntary editors, whose province it is to make a proper selection of cases for publication, to give an analysis of them in the head and marginal notes, and to explain or illustrate them in other annotations. These compilations only so far receive the protection of the State that a certain number of copies are subscribed for out of the public treasury. The compilation entitled ‘*La Legge Romana*’ is a journal of judicial and administrative proceedings for the kingdom of Italy, published at short intervals (the judicial three times a week), and containing in an abridged form notes taken from the minutes in the registers of all the important cases disposed of.

‘In the United States of America there is no law requiring either written decisions or a record or register of the grounds and reasons of the decisions; but the judgments are generally in writing; and in most of the States, and in the Supreme Court of the United States, there are now official reporters, remunerated by salary as well as by a portion of the profits of the publications. These reporters are generally appointed by the State, and are always removable at the discretion of the appointing power, but enjoy in the performance of their duties the same freedom as the authors of our own Law Reports. In the Superior Courts of the city of New York the Judges publish the reports of their own decisions, choosing an editor from among themselves. As a rule, the official reports omit the argument of counsel, and give only a narrative of the facts and the copy of the written judgments. The official publication rarely appears for many months after the judgment is pronounced, and until that time publications called the ‘*Law Reporter*’ and ‘*Law Journal*’ are referred to, but do not profess to give more than the most important cases. No suggestion is made that the official reporters are less efficient or more dilatory than their predecessors under the voluntary system, nor is it found that they are subject to

any improper influence in the discharge of their duties ; and in the State of New York the official reports are required by law to be sold at a much smaller price.'

No information was given to the committee as to law reporting in Germany, Holland, Belgium, Spain, or Portugal.

We do not propose to notice the various suggestions made to the committee, and considered or rejected by them. But one or two were important, and deserve mention.

It was soon found by the committee that among the first matters for consideration was, whether the Government should be requested to take the matter up and appoint official reporters to be paid by the State, and whether their reports should alone be cited as authoritative in the Courts. The committee however determined not to invoke Government aid unless convinced that no other scheme was practicable.

The Profession was very jealous of Government interference ; and especially of Government patronage. Official reporters had been tried in days gone by, and the result was not satisfactory. The Year Books were the work of public functionaries<sup>1</sup>, but they ceased in the reign of Henry VIII. Why, no one seems to have ascertained. In the reign of James I., Lord Bacon attempted to revive the system of official reporting which had been dropped in the reign of Henry VIII ; and Hetley's Reports were the result of this attempt. His Reports are of little value, and official reporting again ceased. Warned by these failures, the committee felt reluctant to recommend a renewal of this system.

It was moreover deemed hopeless to obtain from Government the necessary funds to support an official staff of reporters, especially as such a charge would probably have involved compensation to existing interests, which were then both numerous and important.

The committee was of opinion that a scheme might be framed and carried out independently of the Government ; and it ultimately recommended the formation of an unpaid council having under it two editors, a staff of reporters, and a secretary. This recommendation was submitted to a meeting of the Bar held in November, 1864, and was approved and ultimately carried into execution. The council thus formed consisted of two *ex officio* members, viz. the Attorney-General and Solicitor-General for the time being ; of eight barristers, viz. two chosen by each of the four Inns of Court ; of two serjeants, chosen by Serjeants' Inn ; and of two solicitors, chosen by the Incorporated Law Society. Serjeants' Inn and

<sup>1</sup> Our authorities for this statement are Bacon and Plowden, persons not likely to have been misinformed on such a matter. The doubt cast on the fact in Mr. Hammond's notes to Lieber's *Hermeneutics* appears therefore to be unfounded.

Gray's Inn long held aloof, but both ultimately joined in the scheme. Serjeants' Inn has ceased to exist; but one of its members, Mr. Serjeant Pulling, is still a member of the council.

This council, which has since been incorporated by royal charter, is the distinguishing feature of our improved system of law reporting. The system is thoroughly English in its constitution and working. It is not founded on any abstract principle; it has no legislative authority; it has no monopoly; it exists because it is useful and supplies a professional want. The council appoints and can remove its editors and reporters, and it consists of men in practice who have to use its own productions. It is thus kept alive to all shortcomings, and it can and does apply itself to their prevention and cure. What it has done has already been shortly stated, and no small thanks are due to it for what it has accomplished during the nineteen years of its existence.

It would however be a mistake to suppose that the Law Reports are perfect and that there is no room for improvement in them. The fact that there are still other reports cited as authorities in our Courts is the one great defect in the present system. This remark is not intended to apply to ordinary newspaper reports. There is not only no objection to daily reports in newspapers of what takes place in our Courts, but the existence of such reports is on every account desirable. The public wishes to know, and is entitled to know, what takes place in the various Courts of the country; and no one is likely to complain of reports of this kind, except in cases the details of which are unfit for publication. But newspaper reports are worthless for purposes of reference or study. They are necessarily hastily prepared; they are intended only for the moment; and their purpose is answered when the paper in which they appear has been looked at. But the existence of reports such as 'The Law Journal,' 'The Weekly Reporter,' and 'The Law Times,' all of them intended for professional use and reference, is conclusive proof that the 'Law Reports' have not wholly succeeded in removing the evil which called them into existence. The causes of this comparative failure are worth considering.

The committee on whose report the present system is founded did not recommend a monopoly of citation. A resolution was moved to the effect that no case reported under the supervision and control of the council should be quoted from any other report, but this not to interfere with the quotation from any other report of cases not already so reported. This resolution however was negatived; the committee considering that such a restriction, although in the opinion of several of their members very desirable, should not form part of the scheme. The scheme therefore did not propose

to establish a monopoly by authority. Its omission in this respect naturally struck many persons as a serious defect, and as likely to cause the complete failure of the scheme. At the Bar meeting held in November, 1864, the late Mr. Joshua Williams moved an amendment to the report of the committee, '*That no reports of cases can be sanctioned by this meeting which are not invested by paramount authority with the privilege of exclusive citation,*' and he supported his amendment in a speech well deserving perusal (p. 214). The amendment however was put and lost, and the council had to set to work and do its best without any privilege of exclusive citation. This resolution rendered competition, and with it a multiplicity of reports and a continuance of the old evil, not only possible, but practically certain, unless the reports published by the council were superior to all others, and such as to satisfy all the legitimate wants of all branches of the Legal Profession. If the reports published by the council attained this high standard, it would be to the interest of the Profession to take no others; and others would accordingly disappear. But until such a standard is reached the object sought to be attained by means of the council and of its staff will still remain unrealised.

Let us consider then what are the legitimate wants of all branches of the Legal Profession with respect to law reports. They are both negative and affirmative.

The Profession does not want reports of cases valueless as precedents; nor long reports of complicated facts, when a short condensation of them is all that is necessary to understand the legal principle involved in the decision. This observation applies not only to the reports themselves, but particularly to the head notes of the cases reported. The legal pith of a case and nothing more should appear in its head note.

The affirmative wants may be considered under three heads, viz. 1. The subjects reported; 2. The mode of reporting them; 3. The time and form of their publication.

1. The subjects reported should include all cases which introduce or appear to introduce a new principle or new rule; or which materially modify an existing principle or rule; or which settle or tend to settle a question on which the law is doubtful; or which for any other reason are peculiarly instructive.

If these principles are not attended to, the reports will be unnecessarily bulky, and time and labour will be wasted. But in applying these principles to practice, it must be borne in mind that the reports are wanted not only by men who are already well-informed lawyers, but also by men of a different class; and for their sakes it is better to err on the side of reporting too many

cases than of reporting too few. Collections of rubbish must be carefully avoided; but if an experienced reporter is in doubt as to whether a case is worth reporting or not, it will be safer to report it, however shortly, than wholly to omit it.

Practically the great difficulty is to decide what ought to be done with cases turning on the construction of written documents and with what are called Practice cases. As regards cases on the construction of documents they should be excluded, unless there is some good reason for including them. Cases turning on obscure sentences in wills, contracts or letters which sorely puzzle those who have to put a meaning on them, are absolutely useless for future guidance, and should not be reported at all. At one time there was a tendency, especially in the Chancery Courts, to try and construe one will by means of decisions on other wills more or less like it; but this tendency has been checked of late years, and there is not now any excuse for reporting decisions on wills simply because they were difficult to construe. Similar observations apply to other documents. Some cases on the construction of documents are however very useful. Such are new lights thrown upon common forms, e.g. in charter parties, policies of insurance, ordinary covenants or trusts, &c., &c.; or new interpretations of some Act of Parliament of general application, or of rules of Court. Cases of this kind are unquestionably useful as guides and should be reported.

Practice cases are useful, but only on points that are obscure and unsettled. As a rule they appear to be left by the council in the 'Weekly Notes;' and this is the best place for such of them as are not of unusual value. Revised selections of them might however be usefully published separately when a sufficient number had accumulated.

2. As regards the mode of reporting. The great point to bear in mind is that what the Profession wants is law, and such facts only as are necessary to enable the reader of the report to appreciate the law found in the case. Keeping this in mind, reports should be accurate, full in the sense of conveying everything material and useful, and as concise as is consistent with these requirements. The points contended for by counsel should be noticed, and the grounds on which the judgment is based should receive especial attention. The whole value of a report depends on this part of it, and on the distinctness with which it is brought out. In this respect much of course depends on the Judge and the care he takes to make plain the grounds of his decision. But much also depends upon the reporter. Even when a judgment is written, much of it may relate to matters requiring decision but not worth reporting; and it should be shortened accordingly.

The committee when preparing their scheme to be submitted to the Bar had to consider the question of written judgments. One of the propositions made to the committee was that it should recommend that all judgments of the Superior Courts should, as far as practicable, be written. But the committee did not deem it expedient formally to make any such recommendation. In this matter the committee was right. By judgment here is meant not the formal result of the decision, e.g. judgment for the plaintiff for 500*l.* and costs, or judgment for the defendant with costs, but the reasons given by the Judge for his decision. Now, if Judges were required to put all their judgments into writing, they could not possibly get through their work: it would be necessary to double their numbers in order to enable them to keep fairly up with the business they have to transact. Moreover, a large proportion of every Judge's decisions is of no interest whatever to any one except the parties actually affected. In most of the cases which come before him all difficulty is over when the facts are ascertained and mastered, and nothing would be gained by requiring him to put his judgment into writing. Even in cases heard on appeal it frequently happens that no written judgment is really wanted. No doubt judgments if written would be generally shorter and better expressed than when delivered off-hand and orally. But if an oral judgment is taken down and afterwards carefully revised, it is for all practical purposes as useful as if it had been written beforehand. In cases of real difficulty Judges take time to consider their judgments, and then they usually reduce them to writing. Practically this is found to be all that is wanted. It is, moreover, all that can be done without largely increasing the judicial staff. The committee recommended that the Judges should be requested to appropriate convenient places to be occupied by the reporters, to allow the reporters access to all such papers as they can control and to their written judgments, and themselves to revise the reports of their unwritten judgments before publication. The Judges, it is believed, assist the reporters in these respects, and thereby do what they can to insure accuracy in the judgments reported in the Law Reports.

3. As regards the time and form of publication, the Profession wants the reports published as speedily as possible, good print, good paper, a convenient portable size, convenient arrangement of matter, good indexes, and the lowest price consistent with the payment of the expenses of publication.

As regards print, paper, and price, the Law Reports are quite satisfactory; except that the price charged for odd back numbers appears unnecessarily high. But as regards speed in publication,

indexes, and arrangement of matter, the Law Reports are certainly capable of improvement.

The Law Reports are oftener in arrear than they should be. The numbers of Vol. XXVII. of the Chancery Division, published last November and December, afford striking examples of this defect. The November number contains *Lyell v. Kennedy*, decided by the Court of Appeal as long ago as the 8th of April; *In re Dominion of Canada Plumbago Co.*, decided by Pearson J. in February, and by the Court of Appeal in April; *Newson v. Pender*, decided by V.-C. Bacon in February, and by the Court of Appeal on May 1; *Rolls v. Miller*, decided by Pearson J. in March, and by the Court of Appeal in May; and several other cases decided in May. The December number contains cases decided in May, June, and July. Again, the December number of the Queen's Bench Division contains a case decided in March and several decided in July. The December number of the Probate Division contains a case decided in April. This is not as it should be.

One of the recommendations of the committee was that the November parts should comprise, as far as practicable, every decision not before reported up to the rising of the Courts for the Long Vacation; but the present practice of publishing next to nothing in September and October, and then publishing a whole volume in November and December, is clearly objectionable. Again, a judgment known to be appealed from is frequently not reported until the appeal from it can be reported also. The expediency of this practice is very questionable, when the Appeal Court is so much in arrear with its work as it unfortunately has been for the last few years. Delay in reporting decisions is a serious evil, and is one main reason why any other reports than the Law Reports continue to exist.

Again, it is questionable whether the present classification of the Law Reports is as convenient as might be. It is extremely convenient to large numbers of the Legal Profession to be able to separate certain classes of cases and bind them up together apart from other cases which they themselves seldom want. Such cases as relate to business transacted at Sessions and in Bankruptcy may be referred to as examples. It certainly would be convenient to many men, and to so many as to make their convenience worth studying, if all Criminal cases and cases useful at Sessions could be collected into a small compass and carried about. So with respect to Bankruptcy.

It is quite possible that the council may have weighed these and similar suggestions, and have decided that their own arrangement is best; but nothing ought to be neglected which increases the real

utility of their publications, or which tends to render similar publications unnecessary to any members of the Legal Profession.

The indexes to the Reports might also be improved; for they have much of the defects of the Digest, which is one of the most important of the council's publications. Its Digests are triennial, but in 1876, and again in 1882, consolidated Digests were published. They are no doubt useful, but they are very far indeed from being so useful as they might be. Their main defects are—1. that the titles under which the cases are collected are too few, and are often badly chosen; 2. that the titles themselves are not sufficiently subdivided into smaller divisions with separate headings; and 3. that the Digest is a Digest of cases, rather than of legal principles and rules with references to the cases which illustrate them.

A good Digest, not of cases, but of legal points decided in them, would be one of the most useful of books; if well done, it would not only be invaluable to practitioners, but it would also do more to improve the law as a science than anything which could be devised short of an authoritative code. A code is not within the scope of the functions of the council; but a Digest is; and the council should leave no effort unspared to make its Digest as perfect as possible.

The first point to determine is the arrangement of the matter digested: and, for practical use, an alphabetical arrangement of subjects is probably better than any other. For facility of reference nothing is so convenient as a series of titles in alphabetical order. A dictionary is far more useful for reference than any work arranged on scientific principles, even if accompanied by a good index. The council has done well therefore in adopting an alphabetical order for the titles.

The next point is to choose the titles, and to place everything under its proper title. Very often a case involves many legal points; and whenever this occurs each legal point should be placed under its own most appropriate head. A considerable amount of experience and skill is necessary to ensure a good selection of titles and to arrange the matter placed under them. The titles should be such as are likely to occur to those who consult the Digest; they should find what they want under the head under which they will probably look for it. Such a heading as 'Woman past child-bearing' would hardly occur to any one, and is decidedly bad. The appropriate heading is 'Presumptions,' where a lawyer would naturally look for a decision on such a point.

Again, speaking generally, a heading should not begin with an adjective, but should be a substantive. For example, such headings as 'Education' and 'Schools' are better than 'Elementary



Education' and 'Endowed Schools.' 'Lease' is better than 'Renewable Lease,' which should be a sub-heading of 'Lease.' 'Debt' is better than 'Specialty Debt,' which should be a sub-heading of 'Debt.' The editors of the council's Digest have not been happy in their choice of titles. Very few lawyers would think of looking for information under 'Lake.' They would turn to 'Fishing' or 'Water.'

Again, such cases as *Benjamin v. Storr*, L. R., 9 C. P. 400, and *Fritz v. Hobson*, 14 Ch. D. 542, are important decisions on the law of Nuisance, but are not to be found under that title save by pursuing an obscure cross reference. They are put under 'Highway,' one of them under 'Highway—Nuisance,' and the other under 'Highway—Obstruction.' The consequence is that the title 'Nuisance' is materially incomplete, and the bearing of these cases on that branch of the law is lost.

Neither is the matter under each title well arranged. The title 'Practice' in the Consolidated Digest of 1882 extends from column 2901 to column 3326. The cases relating to Interrogatories and Production of Documents, instead of being brought together, are to be found partly under the head 'Practice, Admiralty,' in cols. 2909 and 2910; partly under 'Practice, Chancery,' in cols. 2948 and 2957 to 2966; partly under 'Practice, Common Law,' in cols. 3036–3048; and partly under 'Practice, Supreme Court,' in cols. 3220–3231. If we turn to the head 'Discovery,' we find references to these and a great number of other places. The decisions on such important subjects as 'Interrogatories' and 'Production of Documents' ought to have been brought together and made sub-divisions of the title 'Discovery,' instead of being scattered about under the title 'Practice.' Both for reference and for study it is better to multiply the leading titles than to collect an enormous mass of matter under one title, even if subdivided into sub-heads.

In the Consolidated Digest each paragraph has headings in italics to catch the eye. The object is good; but the mode of obtaining it not the best. The eye is rather distracted than assisted by these italicised headings. If the headings of each paragraph were abolished, much printing would be saved and space gained; and if the matter digested were more broken up into groups, each with a heading indicative of the subject common to the whole group, the Digest would be greatly improved.

Again, the Digest is too much a Digest of Cases, and not enough a Digest of Principles and Rules. There are too many facts introduced, and the law is not sufficiently extracted. Let any one compare the Consolidated Digest with Comyns' Digest, which is almost perfect in this respect, and the difference will be at once apparent.

A Digest ought not to be a classified mass of the head-notes of the reports; it should be a classified mass of principles and rules, with no more facts than are necessary to indicate differences. Under each sub-head a general proposition should come first, and this proposition should be the most general its place will admit. Then should come qualifications and exceptions. A Digest framed on this principle would be invaluable. The Law Reports have existed long enough to furnish ample materials for such a work; the council has on its staff men quite competent to execute it, and funds ample for its publication. It could confer no greater boon on the Profession than by presenting it with a Consolidated Digest in a greatly improved shape. But this can only be done by recasting the whole work.

The index to the statutes published by the Statute Law Committee is admirable; and the editors of the Consolidated Digest of cases cannot do better than study the preface to that work and be guided by it in the choice and subdivision of titles, on which the value of a Digest so much depends.

The Law Reports and the Digests are so extremely important to all branches of the Legal Profession, they are so valuable, not only to legal practitioners but to all persons who care for English Law as a scientific study or who take an interest in its development and improvement, that every member of the Profession ought to the best of his ability to assist in supporting and perfecting them. It is not too much to say that the Incorporated Council of Law Reporting for England and Wales discharges an important function of the State; and that the mode in which it does so is a matter of national and not merely Professional concern. The foregoing criticisms on its productions have been made with a view to their improvement and in no hostile spirit. The Council and its staff are engaged in a great work, and deserve all the support and encouragement the Profession can give them.

A multiplicity of law reports is a great evil. The evil was once intolerable; it may become so again; whether it will or will not depends on the Profession and on the Council. Let us hope it never will. If it does, a great effort will have failed, and its failure will prove the necessity for legislative interference and for a monopoly of Law Reporting.

NATHANIEL LINDLEY.

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## THE LUNACY LAWS.

**I**N the year 1877 a Select Committee of the House of Commons was appointed to inquire into 'the operation of the Lunacy Law, so far as regards the security afforded by it against violations of personal liberty.' The result of this inquiry was in some degree disappointing to those at whose instance it was undertaken. 'Assuming that the strongest cases against the present system were brought before us, allegations of *mala fides* or of serious abuses were not substantiated.' This was the unanimous report of the Committee; but its members were also agreed in thinking that every possible safeguard should be provided against abuse of a law 'which undoubtedly permits forcible arrest and deportation by private individuals.' They made a series of valuable suggestions for the improvement of our procedure in cases of lunacy. None of these suggestions has yet been carried out.

The sorrows and the triumphs of Mrs. Weldon have called attention once more to this subject. On the trial of *Weldon v. Semple*, Mr. Justice Hawkins said that the existing state of the law was such as to fill him with alarm, and expressed a hope that it would soon be altered. These strong expressions have given a fresh impulse to the zeal of the reformers; and the last few months have yielded a considerable crop of pamphlets, letters, and articles, setting forth the defects of the Lunacy Laws and of the persons who administer them. With personal charges we have here no concern; we shall perhaps be safe in assuming that doctors and commissioners are neither much better nor much worse than other men. The complaints which are made against the law itself are so numerous that we shall have to adopt a concise manner of dealing with them in order to bring them all within the limits of an article.

Some good people have been surprised and shocked to find that English law does not even attempt to define insanity. The old law drew a rough distinction between two classes of insane persons—the lunatic, who has been sane, and may become sane again; and the idiot or fool natural, who never has been and never will be *compos mentis*. This distinction ceased to be important when the Crown gave up the revenue which it derived from the lands of idiots. At an early period some difficulty was experienced in applying the legal definitions of lunatic and idiot to actual cases; and the general description 'a person of unsound mind' was

accepted as a good return to the writ *de lunatico* or *de idiotâ inquirendo*. Lord Hardwicke drew a distinction between unsoundness and mere weakness (*Ex parte Barnsley*, 3 Atk. 168). Lord Eldon, however, thought that the protection of the Court should be extended to a person whose mind was enfeebled by age. The result of *Ridgeway v. Darwin*, 8 Ves. 65, appears to be this: that a person suffering from senile dementia is not a lunatic, but is nevertheless a person to be protected by the issue of a writ 'in the nature of a writ *de lunatico*.' We are now almost entirely absolved from the difficult task of definition by the interpretation clause of the 8 and 9 Vict. c. 100. For the purposes of the Lunacy Acts, 'lunatic' means 'every insane person and every person being an idiot or lunatic or of unsound mind.' The force of interpretation (in the Parliamentary sense of the word) could no farther go.

In this one instance the law seems to have done well rather than ill in refusing to define the terms which it employs. If a definition of insanity were required, we should have to refer to some medical authority. But the medical definition of insanity is far too wide for legal purposes. Some doctors assure us that no man has a perfectly healthy brain; as the law more piously expresses it, 'perfect soundness of mind is not to be predicated, unless of the Deity.' The fact that a man is insane does not imply that he is subject to special disability or entitled to special protection and excuse. The law will not even consider whether a man is sane or not, unless some practical question turns on his sanity; and the practical questions of which the issue of sanity or insanity forms a part are, roughly speaking, four in number—whether a certain agreement shall be enforced; whether a certain will shall be upheld; whether a certain act shall be punished as a crime; whether the person alleged to be insane may be placed under restraint. It seems to me that the law deals with all these questions in the same spirit; and a brief recapitulation of some familiar rules may put this in a clear light.

No agreement is enforced against an insane person if his unsoundness of mind was such as to prevent him from knowing the nature of his promise, or if his unsoundness of mind was known to and turned to account by the other party to the agreement. If neither of these circumstances is proved, an insane person is certainly liable on an executed contract for the supply of things suitable to his station in life, and he is perhaps liable on other classes of contracts. There is no restriction on a lunatic's right to sue.

A will is not upheld if the testator's unsoundness of mind deprived him of the knowledge necessary for disposing of his property, or if it exposed him to the undue influence of others. If

neither of these circumstances is proved, partial unsoundness of mind does not affect the validity of the will.

An act otherwise criminal is not punished as a crime if the person committing it was so insane as not to know the nature of his act. If he knew the nature of his act, partial unsoundness of mind will not save him from punishment. The tendency of modern judges and juries is to give a person of partially unsound mind the benefit of the doubt.

The imposition of restraint is not justified by the mere fact of insanity. At common law, any person is justified in restraining a lunatic who is dangerous to himself or others. Provision has been made by statute for the arrest and detention of a lunatic (1) if he is found insane on arraignment or acquitted on the ground of insanity, (2) if he is likely to commit a crime and has no relation who will be responsible for him, (3) if he is found on inquisition to be incapable of managing himself and his affairs, (4) if he is certified to be a proper person to be detained under care and treatment, (5) if he is wandering at large, or cruelly treated, or otherwise a proper person to be sent to an asylum.

Nobody denies that the persons described in the foregoing paragraph ought to be placed under restraint. But it is asserted that the law gives facilities for the incarceration of persons not falling within any of the descriptions given, and for the undue detention of lunatics who have recovered. What measure of truth there is in these assertions will appear on reviewing the formalities necessary for placing an insane patient under 'care and treatment.' Setting aside criminal lunatics, who do not come within the scope of the Lunacy Laws, we find that insane patients are divided, for administrative purposes, into three classes.

1. *Pauper patients.* No pauper may be received into an asylum, hospital, or licensed house without an order signed by one justice, or by a parish clergyman and a relieving officer, nor without a certificate signed by one medical man who has examined him within seven days previous to his reception. The certificate sets forth that the person signing it is in actual practice, and that he has personally examined the lunatic: it also sets out the facts indicating insanity observed by the medical man, and facts indicating insanity communicated to him by others. This is the ordinary mode of consigning a pauper to an asylum, or to the control of any relation or friend who can satisfy the justice who inquires into the case, or the visiting justices of the asylum, that the lunatic will be properly cared for. The special procedure required by the clauses relating to lunatics at large, &c. does not materially differ from the ordinary form.

Strong statements have been made as to the insufficiency of the protection afforded by these forms; and no small part of the blue book of 1877 is devoted to the case of a lady who was said to have been sent to a pauper asylum by her parish clergyman because she insisted on making her living by photography in the immediate neighbourhood of her sister, who occupied a superior social position. This story completely failed to stand the mild tests to which it was subjected by the Committee; and no other case of abuse was made out under this head. A general objection is taken to the competence of the justices and clergymen who sign orders, and of the medical men who sign certificates. It is suggested that some scientific knowledge of insanity should be required of the persons who hold these momentous inquiries, on which the liberty of a fellow-citizen depends. But the proposal to commit such inquiries to experts in lunacy appears impracticable for various reasons. First, because experts would be almost certain to proceed on the medical rather than on the legal view of insanity. Second, because experts cannot be numerous; and great delay might be caused by the necessity of finding an expert to certify, at the very time when it is most important to place a lunatic under treatment. Third, because experts, constantly inquiring into cases of lunacy, would be virtually officials, and as such more liable to popular suspicion than local magistrates and practitioners.

Again, it is suggested that no person should be placed under restraint without a public inquiry before magistrates in sessions, or before a jury; and *Magna Charta* is sometimes invoked as an authority in favour of trial by jury. These proposals seem to be open to serious objection. In the year 1883, 14,458 persons were admitted into establishments within the jurisdiction of the Lunacy Commissioners. Public inquiries in so large a number of cases would throw an enormous burden on our judicial system. And publicity would be so painful to the families and friends of insane persons that people would be tempted to keep their lunatic friends locked up at home, which is not desirable.

2. *Private Patients.* No person, other than a pauper, may be received into an asylum, &c. without an order signed by some person who has seen the patient within one month prior to its date, together with a statement of particulars signed by the same or some other person; nor without the certificates of two medical men, each of whom has separately examined the patient within seven days before his admission. In case of emergency, one certificate is sufficient, provided two other certificates are obtained within three days after admission. The certificates set out the same particulars as are required in the case of a pauper patient.

A certificate may not be given by a person interested in a licensed house or hospital, or by a medical man who signs the order.

It is plain that the order affords a very imperfect security to a private patient; for the person who signs it is not required to account for himself and to show the authority by which he acts. In Mrs. Weldon's case, the order was signed by a friend who called to see her, at her husband's request, in order that he might qualify himself to sign. There ought to be some process by which a husband in Mr. Weldon's position might be compelled to make himself responsible.

As to the medical certificates, I think the provisions of the law, when properly complied with, afford a tolerably sufficient security to persons placed under restraint as private patients. Serious cases of abuse have occurred; but in all the cases which have been proved, the law has been found to provide a remedy for the persons injured. In Mrs. Weldon's case, the 'separate examination' required by statute was hurried through in a perfunctory way; the two doctors made a joint call, and each left his colleague alone with Mrs. Weldon for a short time. The 'facts indicating insanity' were not stated with proper precision. It appeared that the doctor who took the lead in the examination was a personal friend of the doctor to whose house the patient was consigned, and that he had certified upwards of forty persons into the same house within ten years. A jury has awarded Mrs. Weldon 1000*l.* damages against one of the doctors, and she is endeavouring to obtain further redress from the other parties concerned in her incarceration. Clearly, the risk which a doctor runs in signing a certificate is very considerable—so considerable, that many medical men will not sign at all. If we deal with the doctors too strictly, the result will be that nobody will sign, unless perhaps a doctor who has no money to lose.

3. *Chancery Patients.* On a petition presented by some person interested, or on the report of a Lunacy Commissioner, an order may be made for an inquiry as to the sanity of a person having property, whom it is proposed to place under the protection of the Court. If the property is small the case may be dealt with summarily. The inquiry is usually held before a Master in Lunacy without a jury: a jury is granted in certain cases. The Master has the powers of a judge at *nisi prius* with special power to take evidence by affidavit or otherwise as may be convenient: his court is open to the public. If on inquisition a person is found to be of unsound mind and incapable of managing himself and his affairs, committees are appointed to take the control of his person and estate.

From this very brief outline it appears that the Chancery procedure fulfils the conditions laid down by those who demand a public inquiry into each case of lunacy. Some writers indeed have complained that the Master's Court is a 'hole-and-corner' Court, because it is held at or near the lunatic's residence; but these same writers would probably complain still more bitterly if the Court were held anywhere else. Others complain, with much better reason, that the procedure 'in lunacy' is slow and expensive. The costs incurred by a Chancery patient in superseding the inquisition when he is discharged on recovery are sometimes scandalously heavy.

Having considered the safeguards against unjust incarceration, we may proceed to consider the safeguards against undue detention. It is evidently desirable that a patient should be released from custody as soon as it is safe to let him go. In determining this question of safety, the doctor has often a very difficult duty to perform. A patient may become sane in an asylum and yet remain in such a state that he cannot return to the outer world without running the risk of an immediate relapse. In advising on such a case, the medical officer of an asylum or hospital is in a perfectly independent position. But the keeper of a licensed house has a pecuniary interest in the question of a patient's discharge; he has a certain capital at stake in his business; and each of his patients represents an annual payment which varies from 150*l.* to 600*l.*, the average payment in the best private asylums being about 280*l.* The proprietor of a private asylum may be, and usually is, disinterested in advising the friends of a patient not to remove him; but the fact of his pecuniary interest will always expose him to suspicion—he shall not escape calumny. And it is so important to exclude every cause of suspicion in these matters, that we may well consider whether private houses might not be dispensed with or transferred to some public authority. There are, however, two difficulties in the way of any such scheme. First, the private houses represent a large aggregate capital. In the second place, public authorities might not be able to provide those comforts which the upper classes demand for their lunatic friends. The abolition of private houses might lead to an increase in the number of single patients boarded out with doctors, &c.; and the authorities seem to think that single patients are on the whole worse off than those in asylums.

The safeguards against undue detention provided by the existing law fall under several heads.

1. Elaborate books are kept in every public and private asylum; these books are inspected by the visiting authorities; and state-



ments are regularly transmitted to the Commissioners, giving particulars as to the admission, discharge, death, escape, &c. of patients.

2. Letters written by private patients to the Commissioners or Visitors are required to be forwarded. Letters to other persons, if not forwarded, must be endorsed and kept for the inspection of the Commissioners or Visitors. Patients frequently complain that their letters are suppressed. If any such abuse should exist, it is due to violation of the law, and not apparently to any defect in the law.

3. It is plainly impossible to give the friends of a patient any general right of being admitted to visit him. But one Commissioner or Visitor has power to give an order for the admission of a friend or relative or of a medical man employed by a friend or relative.

4. The most important security against undue detention and ill-treatment is the visitation by public authorities of the places in which lunatics are received. County and borough asylums are visited six times a year by the Justices, and once a year by the Commissioners; the power of discharging patients is exercised by the Visiting Justices. Hospitals are visited, according to their respective regulations, by their Managing Committees; they also receive an annual visit from the Commissioners. Provincial licensed houses are visited four times in the year by two Visiting Justices, twice by one, and twice by the Commissioners. Metropolitan licensed houses are visited four times by two Commissioners, and twice by one. Single patients in unlicensed houses are visited as their cases require; most of them receive two visits a year from the Commissioners. (No person may receive more than one patient for profit without obtaining a licence for his house.) Chancery patients are visited by the Chancery Visitors; if they reside in private houses they are visited not less than twice a year. All the visits which I have enumerated are paid without warning, and may be paid on any day at any hour. Special visits and inquiries may be directed in certain cases by the Lord Chancellor and the Home Secretary; and the Commissioners make a good many special visits without being specially directed to do so.

It is suggested by some reformers that the visits of Justices and Commissioners are not sufficiently frequent. If, for example, a sane man were certified into a private asylum, he might have to wait six or eight weeks before having an opportunity to state his grievance. But a private patient may be discharged at any time by authority of the person signing the order; he may also write to the Commissioners to desire a special inquiry; and the Commissioners may

set him free at any time if they find the order and certificates irregular, or if two of them, making separate visits, find that the patient is not a fit person to be detained. Weekly or daily visitation would add little to the security afforded by these provisions, and would involve an enormous increase in the expense of working the Acts.

It is also suggested that visiting authorities do their work in a perfunctory manner; that they listen only to the doctors, and refuse to hear the patients. Such complaints must always be frequent; for of every six coherently speaking lunatics five at least believe themselves to be unjustly detained. If Visitors are sometimes content with superficial inquiries, it is clear that no great improvement can be effected in this respect by a mere alteration of the law.

The Lunacy Acts have no application to lunatics received into private houses, unless they are received for profit. There are therefore individuals and societies who keep insane persons under restraint without being liable to any sort of inspection or control. Some zealous Protestants assert that in Romish and Anglican convents insane nuns are kept locked up, as Mr. Rochester kept his first wife. There is probably some exaggeration in these stories; but it seems desirable that every person keeping a lunatic under restraint should at least be required to report to the Commissioners.

It remains to inquire what remedies and punishments are provided in case the safeguards enumerated should prove insufficient for the protection of any person, sane or insane, coming within the scope of the Lunacy Laws. Certain provisions in the Acts have been quoted to prove that they are drawn with a tender regard to the interest of the mad doctors. Thus the 8 and 9 Vict. c. 100. s. 99 enacts that a person acting under an order and certificates may plead the same in answer to any action or indictment; and s. 105 of the same Act requires an action in respect of anything done in pursuance of the Act to be brought within twelve months after the plaintiff's release. These enactments have really made very little alteration in the common-law liabilities of those who take part in placing a lunatic under restraint: witness the following cases.

In an action brought by a nephew against his uncle for signing an order for the nephew's confinement, defendant pleaded that the plaintiff behaved as an insane person, that two doctors certified him insane, as required by law, and that the defendant believed the certificates. The plea was held bad for not alleging insanity as a fact. (*Fletcher v. Fletcher*, 1 E. & E. 420; 28 L. J., Q. B. 134). In

this case it was held that s. 99 above cited does not protect the person signing the order.

In an action against a certifying doctor for negligence, Crompton, J., told the jury that a certificate is not given in pursuance of the Act, within the meaning of s. 105 above cited, if it is untrue in fact and signed without due inquiry. To take the case out of the protection of the Act, it is not necessary that the certificate should be untrue to the doctor's knowledge, or that he should have an improper motive. A doctor is not liable for a mere mistake: what degree of care he ought to take is a question for the jury (*Hall v. Semple*, 3 F. & F. 337). The jury found that the doctor believed in the truth of his certificate, and believed himself to be acting under the authority of the Act; but that he made his inquiries carelessly. Damages 150*l.*

In *Weldon v. Semple*, the jury having found both malice and negligence, Hawkins, J., said that the findings disposed of the pleas and objections founded on the Statutes. ('Times,' 29 July, 1884.)

In *Weldon v. Winslow*, Denman, J., said the question for the jury would be: Did the defendant act *bona fide*, under what he believed to be *bona fide* certificates, himself honestly believing the plaintiff to be of unsound mind? ('Times,' 28th Nov., 1884.)

On the other hand, the common-law right to restrain a lunatic is not affected by the statutes. Thus, on the return to a writ of habeas corpus, if it appear that the person confined is insane and unfit to be at large, the Court will not order his discharge, though the order and certificates are irregular (*Re Skuttleworth*, 9 Q. B. 651). The case is like that of a person irregularly committed, who will not be discharged on habeas corpus if it appears that there was good reason for committing him.

In an action against the keeper of a licensed house, it was held that s. 99 above cited was intended to make the order and certificates a complete justification for the defendant, 'without putting him to the trouble and expense of making out the fact which is certified to him to be actually true.' If the person certified is in fact sane, the proper remedy is by habeas corpus or by application to the Commissioners. (*Norris v. Seed*, 3 Exch. 782.)

The Lunacy Acts do not affect the right to prosecute for any act which amounts to a crime or offence under the ordinary criminal law. But the right to prosecute for offences against the Acts themselves is confined to the Commissioners and Visiting Justices, and the Home Secretary. This restriction is much complained of; but there is something to be said in favour of it. Persons in charge of lunatics must do many acts which are justified only by necessity, or by the extreme difficulty of the duties which they perform.

Thus an attendant may injure a maniac patient in defending his own life; or a medical officer may make a misleading entry in his books without any intention to deceive. In such cases it seems fair that an impartial administrative authority should inquire into the circumstances, and decide whether there ought to be a prosecution.

The Lunacy Acts have made considerable additions to the list of indictable offences. Any person is guilty of a misdemeanour, (1) if he acts as a Commissioner, &c. while interested in a licensed house; (2) if he makes a false statement in a certificate, application for licence, register of admissions, &c.; (3) if he receives a patient without giving notice, or without the required order and certificate or certificates; (4) if he receives a single patient without giving notice to the Commissioners, or if he receives more than one patient in an unlicensed house; (5) if he refuses or neglects to show any patient or any part of an asylum of which he is in charge to the visiting authorities, or fails to give true and full answers to the questions they put; (6) if he ill-treats any lunatic of whom he is in charge. A husband was indicted for ill-treating his lunatic wife: it was held that he was in charge of her as her husband and not under the Acts; and so much of the conviction as related to the statutes was quashed (*R. v. Rundle*, 1 Dearsly, 486). But a person who undertook the care of his lunatic brother was held to be within the Acts (*R. v. Porter*, 33 L. J., M. C. 126).

Minor offences against the Acts are made punishable by fines varying from 2*l.* to 50*l.* Any medical man who commits an act (not being a misdemeanour) contrary to the Acts is guilty of an offence.

I have endeavoured to give, in a brief compass, a fairly complete account of those provisions of the Lunacy Laws which concern the safety and the liberty of the subject. In a few points the law is seriously defective; in many points it admits of improvement; but its principles are sound, and its forms afford a better security against abuse than most people suppose. It is too much the fashion of the present day to blame the law as often as anything goes wrong. For example, the verdict in *Weldon v. Semple* is taken to justify the statement that the Lunacy Laws are in a scandalous state. It appears to me that the findings in that case were really to this effect: that the law provided adequate safeguards for Mrs. Weldon, and that the safeguards were rendered useless by the negligence and dishonesty of certain individuals. The only change in the law which would meet the case would be a short Act to provide that no doctor shall be negligent or dishonest.

But without admitting that the existing law is essentially unjust or oppressive, we may find in it ample scope for the exercise of

reforming energy. I venture to offer the following suggestions towards the amendment of the Lunacy Laws. They are founded in part on the recommendations of the Committee of 1877.

The administrative law relating to lunatics should be re-drawn in a style as simple as the nature of the subject will permit. The exceptional status of the Chancery lunatic should be taken away, and the process of placing a lunatic in confinement should be made the same in all cases. In each case we should require (1) An order, accompanied by a statement considerably more detailed than the statement now required. Information should be given as to the lunatic's relations, property, &c., the authority of the person signing the order, and, if there is a nearer relation, the reasons why such relation does not sign. (2) The certificates of two doctors, who should examine and report separately, not communicating with each other or with the medical officer to whose care the patient is consigned. 'Facts indicating insanity communicated by others' should be verified by written statements, signed by the witnesses relied on. In the case of a pauper, the parish clergyman should have power to sign an order; a magistrate should have power to sign the order, and to dispense with one of the certificates if he thinks the case free from doubt. If a relative or friend signs the order, the Commissioners should have power to register him as the lunatic's guardian, and to appoint the same or some other person to be trustee of the lunatic's property and business if any. Guardian and trustee should account to the Commissioners when required; if the property is large, they should act under the directions of the Chancery Division.

The Chancery Visitors should be combined with the Commissioners, and the work of visitation better distributed. The Masters would be the appropriate officers to hold special inquiries of importance.

Facilities might be given for transferring private asylums to local authorities or others who would undertake to conduct them without profit.

All persons keeping lunatics privately without profit should report to the Commissioners. Such reports should be treated as confidential; but the Commissioners should have power to send a medical man to make inquiries in such cases. The police should report all lunatics whom they know to be kept under restraint in unlicensed houses.

A lunatic discharged on recovery should be furnished with a memorandum showing when and by whom he was placed in confinement, the nature of his case, &c., and instructing him how to obtain further information if he requires it.

The effect of the foregoing proposals on the existing practice 'in lunacy' may be thus summarised :—

1. It is proposed to do away with the necessity of an inquiry by a Master in the case of a person placed under the protection of the Court. If I may judge from the evidence passed by the Masters in some recent cases, the inquiry affords no security beyond that which is afforded by requiring two medical certificates.

2. It is proposed to extend the protection of the Court to every lunatic for whom the Commissioners may think fit to assign a guardian or trustee. In *Vane v. Vane*, 2 Ch. D. 124, Sir G. Jessel said that the Court had original jurisdiction to give directions as to the guardianship and maintenance of a lunatic, but that this power would not be exercised unless where the property was small and it was not intended to take proceedings in lunacy. But in *Re Bligh*, 12 Ch. D. 364, James and Cotton LJJ. said the Court had no power to appoint a guardian, and could not give directions as to maintenance, unless by way of administering a trust. The proposal is, to confer or confirm the power claimed by Sir G. Jessel, while avoiding expense by making it possible to obtain a guardian or trustee without application to the Court.

T. RALEIGH.

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## EARLY ENGLISH EQUITY.

I. *Uses*.

AT the end of the reign of Henry V. the Court of Chancery was one of the established courts of the realm. I think we may assume that it had already borrowed the procedure of the Canon law, which had been developed into a perfected system at the beginning of the thirteenth century, at about the same time that the Chancellor became the most important member of the King's Council. It had the 'Examination and oath of the parties according to the form of the civil law and the law of Holy Church in subversion of the common law<sup>1</sup>.' It had the subpoena, which also it did not invent<sup>2</sup>, and it had a form of decree requiring personal obedience<sup>3</sup>.

Down to the end of the same reign (Henry V.) there is no evidence of the Chancery having known or enforced any substantive doctrines different from those which were recognized in the other courts except two. One of them, a peculiar view of contract, has left no traces in modern law. But the other is the greatest contribution to the substantive law which has ever been set down to the credit of the Chancery. I refer to Uses, the parent of our modern trusts. I propose to discuss these two doctrines in a summary way as the first step toward answering the question of the part which Equity has played in the development of English law.

As a preliminary, I ought to state that I assume without discussion that the references to *aequitas* in Glanvill, Bracton, and some of the early statutes passed before the existence of a Chancery jurisdiction, have no bearing on that question<sup>4</sup>. I ought also to say

<sup>1</sup> 4 Rot. Parl. 84 (3 Hen. V. pt. 2. 46, no. xxiii).

<sup>2</sup> See writ addressed to sheriff, Rot. Claus. 16 Hen. III. m. 2 verso in 1 Royal Letters, Hen. III. (Rolls ed.), 523. Proc. Privy Council (Nicholas) passim. Stat. 20 Ed. III. c. 5. The penalty was usually money, but might be life and limb; 1 Proc. Priv. Councl. (21 R. II. A. D. 1397). The citation of Rot. Parl. 14 Ed. III. in 1 Roll. Abr. 372, which misleads Spence (1 Eq. 338 n.) and earlier and later writers, should be 14 Ed. IV. (6 Rot. Parl. 143), as pointed out already by Blackstone, 3 Comm. 52 n. We also find the writ *Quibusdam certis de causis*, a writ in the form of the subpoena except that it omitted the penalty; Palgrave, King's Council, pp. 131, 132, note X; *Scaldewell v. Stormesworth*, 1 Cal. Ch. 5.

<sup>3</sup> See *Audeley v. Audeley*, Rot. Claus. 40 Ed. III., '*sur peine de sys mill livres au paier au roy*,' cited Palg. King's Council, 67, 68; 2 Cal. Ch. x. See prayer in 3 Rot. Parl. 61 (2 R. II. 26). Imprisonment for contempt again is older than the Chancery, e. g. Mem. in Scacc. 27 (M. 22 Ed. I) in Maynard's Y. B. part 1.

<sup>4</sup> Glanvill, Prologus, Bracton, fol. 23 b; ib. 3 b, '*Aequitas quasi aequalitas*.' Fleta, ii. c. 55, § 9. Petition of Barons, c. 27 (A. D. 1258), in Annals of Burton (Rolls ed.), 443, and Stubbs, Select Charters, for remedy *ex aequitate juris* by writ of entry or otherwise. Dictum de Kenilworth, pr. (A. D. 1266) Stat. of Realm, 51 Hen. III., and Stubbs, Select Charters; Close Rolls of Hen. III., cited in Hardy, Int. to Close Rolls, xxviii. n. 5 (8vo. ed. p. 111). So 'right and equite,' letter missive of Hen. V. to Chancellor, 1 Cal. Ch. xvi.

that the matters of grace and favour which came before the Council and afterwards before the Chancellor do not appear to have been matters in which the substantive rules of the common law needed to be or were modified by new principles, but were simply cases which, being for some reason without the jurisdiction of the King's ordinary courts, either were brought within that jurisdiction by special order, or were adjudged directly by the Council or the Chancellor according to the principles of the ordinary courts<sup>1</sup>.

I agree with the late Mr. Adams<sup>2</sup> that the most important contribution of the Chancery has been its (borrowed) procedure. But I wish to controvert the error that its substantive law is merely the product of that procedure. And, on the other hand, I wish to show that the Chancery, in its first establishment at least, did not appear as embodying the superior ethical standards of a comparatively modern state of society correcting the defects of a more archaic system. With these objects in view, I proceed to consider the two peculiar doctrines which I have mentioned.

First, as to Uses. The feoffee to uses of the early English law corresponds point by point to the *Salman* of the early German law, as described by Beseler fifty years ago<sup>3</sup>. The *Salman*, like the feoffee, was a person to whom land was transferred in order that he might make a conveyance according to his grantor's directions<sup>4</sup>.

<sup>1</sup> Supervisory powers of Council over the Court, 1 Gesta Hen. II. (Ben. Abbas, Rolls ed.), 207, 208; Assize of Northampton, § 7, ib. 110; and in Stubbe, *Select Charters*. Jurisdiction of Curia Regis over pleas of land, not coming there as a matter of course, acquired by special order: 'Quod debeat vel dominus Rex velit in curia sua deduci;' Glanv. i. c. 5. Jurisdiction of actions of contract *de gratia*; Bracton, fol. 100 a; Case referred by Chancellor to Curia Regis, 38 Ed. III., Hardy, *Int. to Close Rolls*, xxix (8vo. ed. 113 n.). Grants of jurisdiction *de gratia* in the form of Special Commissions of oyer and terminer complained of, Palgr. King's Council, §§ 12, 13, pp. 27-33; Stat. Westm. ii (13 Ed. I.) c. 29; 1 Rot. Parl. 290 (8 Ed. II. no. 8); Stat. Northampton (2 Ed. III.), c. 7; 2 Rot. Parl. 286, 38 Ed. III. 14, no. vi; 3 Rot. Parl. 161 (7 R. II. no. 43).

As to cases terminated before the Council, see Rot. Claus. 8 Ed. I. m. 6 verso, in Ryley, *Plac. Parl.* 442, and in 2 Stubbe, *Const. Hist.* 263. n. 1; 2 Rot. Parl. 228 (25 Ed. III. no. 16; cf. no. 19). 3 Rot. Parl. 44 (3 R. II. no. 49) seems mistranslated by Parkes, *Hist. Ct. of Ch.* 39, 40. Matters at common law and of grace to be pursued before the Chancellor; Rot. Claus. 22 Ed. III. p. 2. m. 2 verso, cited Hardy, *Int. to Close Rolls*, xxviii. (8vo. ed. 110), and Parkes, *Hist. Court of Ch.* 35, 36, n. See Stat. 27 Ed. III. st. 1. c. 1; Stat. 36 Ed. III. st. 1. c. 9. All the reported cases in Chancery through Henry V., with the exceptions which have been mentioned, are trespasses, disseins, and the like. And the want of remedy at law is generally due to maintenance and the power of the defendant, or in one instance to the technical inability of the plaintiff to sue the defendant (2 Cal. Ch. viii.), not to the nature of the right invoked. The object of the repeated prayers of the Commons from Richard II. to Henry VI. directed against the Council and the Chancellor, was that common law cases should be tried in the regular courts, not that the ancient doctrine might prevail over a younger and rival system. See Adams, *Equity*, Introduction, xxxiii-xxxv.

<sup>2</sup> Adams, *Equity*, *Introd.* xxxv.

<sup>3</sup> Beseler, *Erbverträgen*, i. § 16. pp. 277 et seq., 281, 271.

<sup>4</sup> Beseler, i. §§ 15, 16; Heusler, *Gewere*, 478. Compare 2 Cal. Ch. iii.; 1 id. xlviii. and *passim*. 'Permanency of profits, execution of estates, and defence of the land, are the three points of the trust' or use. Bacon, *Reading on Stat. of Uses, Works* (ed. Spedding), vii. p. 401; 1 Cruise, *Dig. Title XI. ch. 2. § 6*; see Tit. XII. ch. 1. § 3; ch. 4. § 1. Some of the first feoffments to the use (*ad opus*) of another than the feoffee which I have found



Most frequently the conveyance was to be made after the grantor's death, the grantor reserving the use of the land to himself during his life<sup>1</sup>. To meet the chance of the Salman's death before the time for conveyance over, it was common to employ more than one<sup>2</sup>, and persons of importance were selected for the office<sup>3</sup>. The essence of the relation was the *fiducia* or trust reposed in the *fidelis manus*<sup>4</sup>, who sometimes confirmed his obligation by an oath or covenant<sup>5</sup>.

This likeness between the Salman and the feoffees to uses would be enough, without more, to satisfy me that the latter was the former transplanted. But there is a further and peculiar mark which, I think, must convince every one, irrespective of any general views as to the origin of the common law.

Beseler has shown that the executor of the early German will was simply a Salman whose duty it was to see legacies and so forth paid if the heirs refused. The *heres institutus* being unknown, the foreign law which introduced wills laid hold of the native institution as a means of carrying them into effect. Under the influence of the foreign law an actual transfer of the property ceased to be required. It was enough that the testator designated the executors and that they accepted the trust; and thus it was that their appointment did not make the will irrevocable, as a gift with actual delivery for distribution after the donor's death would have been<sup>6</sup>.

There can be no doubt of the identity of the continental executor and the officer of the same name described by Glanvill; and thus the connection between the English and the German law is made certain. The executor described by Glanvill was not a universal

mentioned by that name seem to have been a means of conveying property to the *cestui que use* in his absence, very like the earliest employment of the salman. But as the conveyances are supposed to be made to servants of private persons (Bract. fol. 193 b) or officers of the king, it may be doubtful whether any inference can be drawn from them; 1 Royal Letters, Henry III. pp. 122, 420; cf. 421 (A. D. 1220, 1223). Compare Provisions of Oxford (Oath of guardians of king's castles) in Annals of Burton (Rolls ed.), 448, and Stubbs, Select Charters. And it seems doubtful whether the expression *ad opus* was used at first in a technical sense, e. g. 'castellum Dofris . . . ad opus meum to facturum,' Eadmer (Rolls ed.), 7. 'Ad opus ejusdem mulieris,' 2 Gesta Hen. II. (Ben. Abbas, Rolls ed.), 160, 161; Y. B. 3 Ed. III. 5. pl. 13; 2 Rot. Parl. 286 (38 Ed. III. 14, no. vi).

But as early as 22 Ass. pl. 72. fol. 101, in the case of a gift alleged to be fraudulent, we find the court inquiring who took the profits, and on the inquest answering that the donor did, Thorp declares that the gift only made the donee guardian of the chattels to the use of the donor. See further St. 7 R. II. c. 12.

<sup>1</sup> Beseler, i. § 16. pp. 277 et seq.; Heusler, *supra*. Nearly every feoffment mentioned in the Calendars of Proceedings in Chancery down to the end of Henry VI. is for the purpose of distribution after death. 1 Cal. Ch. xxi. xxxv. xliii. liv. lv. lvi; 2 id. iii. xix. xx. xxi. xxii. xxxiii. xxxvi. &c. Abbrev. Plac. 179. col. 2, Norht. rot. 15 do.; ib. 272, H. 9 Ed. I, Suff. rot. 17. Fitz. Abr. *Subpena*, pl. 22, 23; Littleton, § 462.

<sup>2</sup> Beseler, i. p. 283; 2 Cal. Ch. iii.

<sup>3</sup> Beseler, i. p. 267; 'Fidei sue committens,' ib. 286. Compare the references to good faith in all the bills in Cal. Ch.

<sup>4</sup> Beseler, i. pp. 265-267; 2 Cal. Ch. iii. xxviii.; 1 id. lv.

<sup>5</sup> Beseler, *Erbverträgen*, i. pp. 284-288; Brunner in 1 Holtzendorff, *Encyclop.* (3rd ed.), 216; cf. Littleton, § 168.

<sup>6</sup> Beseler, i. p. 271.

successor. Indeed, as I have shown in my book on the Common Law, the executor had not come to be so regarded, nor taken the place of the heir in the King's courts even as late as Bracton. To save space I do not copy Glanvill's words, but it will be seen on reading that the function of the executor was not to pay debts—that was the heir's business<sup>1</sup>, but to cause to stand the reasonable division of the testator as against the heirs<sup>2</sup>. The meaning of this function will be further explained when I come to deal with the rights of the *cestui que use*<sup>3</sup>.

The executor had already got his peculiar name in Glanvill's time, and it would rather seem that already it had ceased to be necessary for the testator to give him possession or seizin. But, however this may be, it is certain that when the testator's tenements were devisable by custom, the executor was put in possession either by the testator in his life-time or else immediately after the testator's death. As late as Edward I. 'it seemed to the court as to tenements in cities and boroughs which are left by will (*que legata sunt*) and concerning which there should be no proceeding in the King's Court, because it belongs to the ecclesiastical forum<sup>4</sup>, that first after the death of the testator the will should be proved before the ordinary, and the will having been proved, the mayor and bailiffs of the city ought to deliver seizin of the devised and devisable tenements (*de tenementis legatis et que sunt legabilia*) to the executors of the will saving the rights of every one<sup>5</sup>. A little later the executor ceased to intervene at all, and the devisees might enter directly. Or, if the heir held them out, might have the writ *Ex gravi querela*<sup>6</sup>.

<sup>1</sup> Glanv. vii. c. 8; see xiii. c. 15; Dial. de Scaccario, II. 18; Regiam Majestatem, II. c. 39.

<sup>2</sup> Glanv. vii. c. 6-8.

<sup>3</sup> As to the functions of the executor in the time of Bracton, see The Common Law, 348, 349, and further, Bracton, fol. 407 b, 'Et sicut dantur haeredibus contra debitores et non executoribus ita dantur actiones creditoribus contra haeredes et non contra executores.' Ibid. fol. 98 a, 101 a, 113 b; Stat. 3 Ed. I. c. 19. The change of the executor to universal successor upon the obvious analogy of the haeres was inevitable, and took place shortly after Bracton wrote. It was held that debt lay against and for executors; Y. B. 20 & 21 Ed. I. 374; 30 Ed. I. 238. See further, Stat. Westm. ii. 13 Ed. I. cc. 19, 23 (A. D. 1285); Fleta. ii. c. 62. §§ 8-13; c. 70. § 5; and c. 57. §§ 13, 14, copying, but modifying, Bract. fol. 61 a, b, 407 b supra. As to covenant, see Y. B. 48 Ed. III. 1, 2. pl. 4. The heir ceased to be bound unless named; Fleta. ii. c. 62. § 10; The Common Law, 348; cf. Fitz. Abr. *Debt*, pl. 139 (P. 13 Ed. III.). Finally, Doctor and Student, i. c. 19, ad finem, speaks of 'the heir which in the law of England is called the executor.' In early English, as in early German law, neither heir (Y. B. 32 & 33 Ed. I. 507, 508) nor executor was liable for the parol debts of ancestor or testator (Y. B. 22 Ed. I. 456; 41 Ed. III. 13. pl. 3; 11 Hen. VII. 26; 12 Hen. VIII. 11. pl. 3; Dr. and Stud. ii. c. 24), because not knowing the facts they could not wage their law: Y. B. 22 Ed. I. 456; Laband, *Vermögensrechtlichen Klagen*, pp. 15, 16.

<sup>4</sup> Cf. Bract. fol. 407 b.

<sup>5</sup> Abbr. Plac. 284, 285 (H. 19 Ed. I. Devon. rot. 51). Note the likening of such tenements to chattels, Bract. 407 b; 40 Ass. pl. 41; Co. Lit. 111 a.

<sup>6</sup> 39 Ass. pl. 6, fol. 232, 233, where there is no question of the executor, but special custom determines whether the devisee shall enter, be put in by the bailiff, or have the

If, as I think, it is sufficiently clear that in the reign of Edward I. the distinction between an executor and feoffee to uses was still in embryo, it is unnecessary to search the English books for evidence of the first stage when the testator transferred possession in his own lifetime. A case in 55 Henry III. shows executors seized for the purpose of applying the land to pious uses under a last will, and defending their seizin in their official capacity, but does not disclose how they obtained possession<sup>1</sup>. A little earlier still Matthew Paris speaks of one who, being too weak to make a last will, makes a friend *expressorem et executorem*<sup>2</sup>. It is a little hard to distinguish between such a transaction and a feoffment to uses by a few words spoken on a death-bed, such as is recorded in the reign of Henry VI.<sup>3</sup> But the most striking evidence of the persistence of ancient custom was furnished by King Edward III. in person, who enfeoffed his executors, manifestly for the purpose of making such distribution after his death as he should direct; but because he declared no trust at the time, and did not give his directions until afterwards, the judges in Parliament declared that the executors were not bound, or, as it was then put, that there was no condition<sup>4</sup>.

Gifts *inter vivos* for distribution after death remained in use till later times<sup>5</sup>. And it may be accident, or it may be a reminiscence of ancient tradition, when, under Edward IV., the Court, in holding that executors cannot have account against one to whom the testator has given money to dispose of for the good of his soul, says that as to that money the donee is the executor<sup>6</sup>.

At all events, from an early date, if not in Glanvill's time, the necessity of a formal delivery of devised land to the executor was got rid of in England as Beseler says that it was on the Continent. The law of England did in general follow its continental original in requiring the two elements of *traditio* and *investitura* for a perfect conveyance<sup>7</sup>. But the Church complained of the secular courts

writ. In Littleton's time the devisee's right of entry was general; § 167; Co. Lit. 111. As to the writ, see 40 Ass. pl. 41. fol. 250; F. N. B. 198 L. et seq.; Co. Lit. 111. The only writ mentioned by Glanvill seems to be given to the executor, or if there is no executor to the *propinqui*; lib. vii. co. 6, 7. Of course I am not speaking of cases where the executors were also the devisees, although even in such cases there was a tendency to deny them any estate, if there was a trust; 39 Ass. pl. 17; Litt. § 169.

<sup>1</sup> Abbrev. Plac. 179. col. 2; Norht. rot. 15 in dorso.

<sup>2</sup> 4 Matt. Paris, Chron. Maj. (Rolls ed.) 605, A.D. 1247.

<sup>3</sup> 1 Cal. Ch. xliii.; S. C. Digby, Hist. Law of Real Prop. (2nd ed.), 301, 302. Cf. Heusler, Gewere, 478, citing Meichelbeck (1 Hist. Fris. Pars instrumentaria), no. 300; 'Valida egritudine depressus traditionem in manus proximorum suorum posuit, eo modo, si ipse ea egritudine obisset, ut vice illius traditionem perfeiceret.'

<sup>4</sup> 3 Rot. Parl. 60, 61 (2 R. II. nos. 25, 26).

<sup>5</sup> Babington v. Gull, 1 Cal. Ch. lvi; Mayhew v. Gardener, 1 Cal. Ch. xcix, c.

<sup>6</sup> Y. B. 8 Ed. IV. 5. pl. 12. In Mayhew v. Gardener, 1 Cal. Ch. xcix, c, the defendant, who had received all the property of a deceased person by gift in trust to pay debts, &c., was decreed to pay dilapidations for which the deceased was liable.

<sup>7</sup> Glanv. vii. c. 1. § 3; Annals of Burton (Rolls ed.), 421 (A.D. 1258); Bracton, fols. 38 a, b, 39 b, 169 b, 194 b, 213 b. § 3, 214 b; Abbr. Plac. 272 (H. 9 Ed. I.), Suff. rot. 17;

for requiring a change of possession when there was a deed<sup>1</sup>. And it was perhaps because wills belonged to the spiritual jurisdiction that the requirement was relaxed in the case of executors. As has been shown above, in the reign of Edward I. possession was not delivered until after the testator's death, and in that of Edward III. it had ceased to be delivered to them at all. Possibly, however, a trace of the fact that originally they took by conveyance may be found in the notion that executors take directly from the will even before probate, still repeated as a distinction between executors and administrators<sup>2</sup>.

It is now time to consider the position of the *cestui que use*. The situations of the feoffor or donor and of the ultimate beneficiaries were different, and must be treated separately. First, as to the former. In England, as on the Continent, upon the usual feoffment to convey after the feoffor's death, the feoffor remained on the land and took the profits during his life. Feoffors to uses are commonly called pernors of profits in the earliest English statutes and are shown in possession by the earliest cases<sup>3</sup>. As Lord Bacon says in a passage cited above, pernancy of the profits was one of the three points of a use. It was the main point on the part of the feoffor, as to make an estate, or convey as directed, was the main duty on the side of the feoffee. But all the German authorities agree that the pernancy of the profits also made the *gewere*, or protected possession, of early German law<sup>4</sup>. And in this, as in other particulars, the English law gave proof of its origin. In our real actions the mode of alleging seizin was to allege a taking of the esplees or profits<sup>5</sup>.

If the remedies of the ancient popular courts had been preserved in England, it may be conjectured that a *cestui que use* in possession would have been protected by the common law<sup>6</sup>. He was not, because at an early date the common law was cut down to that portion of the ancient customs which was enforced in the courts of the King. The recognitions (*assizes*), which were characteristic of the royal tribunals, were only granted to persons who stood in a

<sup>1</sup> Cal. Ch. liv, lv; Beseler, Erbverträgen, i. § 15. p. 261; § 16. pp. 277 et seq.; Heusler, Gewere, pp. 1, 2; Sohm, Eheschliessung, p. 82; Schulte, Lehrb. d. Deutsch. R. u. Rechts-gesch. § 148 (5th ed.), pp. 480 et seq.

<sup>2</sup> Annals of Burton (Rolls ed.), 421 (A. D. 1258).

<sup>3</sup> *Graysbrook v. Fox*, Plowd. 275, 280, 281.

<sup>4</sup> Stat. 50 Ed. III. c. 6; 1 R. II. c. 9 ad fin.; 2 R. II. Stat. 2. c. 3; 15 R. II. c. 5; 4 Hen. IV. c. 7; 11 Hen. VI. cc. 3, 5; 1 Hen. VII. c. 1; 19 Hen. VII. c. 15; *Rothenhale v. Wyckingham*, 2 Cal. Ch. iii. (Hen. V.); Y. B. 27 Hen. VIII. 8; Plowden, 352; Litt. §§ 462, 464; Co. Lit. 272 b. So 1 Cruise, Dig. Tit. 12. ch. 4. § 9: 'if the trustee be in the actual possession of the estate (which scarce ever happens).'

<sup>5</sup> Heusler, Gewere, 51, 52, 59; Brunner, Schwurgerichte, 169, 170; Laband, Vermögens-rechtlichen Klagen, 160; 1 Franken, Französ. Pfandrecht, 6.

<sup>6</sup> Jackson, Real Actions, 348 and passim. See Statutes last cited, and Stat. 32 Hen. VIII. c. 9. sect. 4.

<sup>7</sup> 1 Franken, Französ. Pfandr. 6.

feudal relation to the King<sup>1</sup>, and to create such a relation by the tenure of land, something more was needed than *de facto* possession or pernancy of profits. In course of time the fact that the new system of remedies did not extend itself to all the rights which were known to the old law became equivalent to a denial of the existence of the rights thus disregarded. The meaning of the word 'seizin' was limited to possession protected by the assizes<sup>2</sup>, and a possession which was not protected by them was not protected at all. It will be remembered, however, that a series of statutes more and more likened the pernancy of the profits to a legal estate in respect of liability and power, until at last the statute of Henry VIII. brought back uses to the courts of common law<sup>3</sup>.

It is not necessary to consider whether the denial of the assizes to a *cestui que use* in possession was peremptory and universal from the beginning, because the feoffor had another protection in the covenants which, in England as on the Continent, it was usual for him to take<sup>4</sup>. For a considerable time the Anglo-Norman law adhered to the ancient Frankish tradition in not distinguishing between contract and title as a ground for specific recovery, and allowed land to be recovered in an action of covenant, so that it would seem that one way or another feoffors were tolerably safe<sup>5</sup>.

But *cestuis que use* in remainder were strangers both to the covenant and the possession. There was an obvious difficulty in finding a ground upon which they could compel a conveyance. The ultimate beneficiaries seem to have been as helpless against the salman in the popular courts on the Continent as they were against the feoffee in the Curia Regis. Under these circumstances the Church, which was apt to be the beneficiary in question, lent its aid. Heusler thinks that the early history of these gifts shows that they were fostered by the spiritual power in its own interest, and that they were established in the face of a popular struggle to maintain the ancient rights of heirs in the family property, which was inalienable without their consent<sup>6</sup>. In view of the effort which the

<sup>1</sup> Heusler, Gewere, 126, 423, 424.

<sup>2</sup> Heusler, Gewere, 424.

<sup>3</sup> See Statutes before cited, p. 167, n. 3, and 1 R. III. c. 1; 27 Hen. VIII. c. 10.

<sup>4</sup> E.g. *Rothenkale v. Wyckingham*, 2 Cal. Ch. iii.

<sup>5</sup> The Common Law, 400. See further, Ll. Gul. I. c. 23; Statutum Walliae, 12 Ed. I, 'Breve de conventionie, per quod petuntur aliquando mobilia, aliquando immobilia'; 'Per breve de conventionie aliquando petitur liberum tenementum.' Fleta, ii. c. 65. § 12; Y. B. 22 Ed. I. 494, 496, 598, 600; 18 Ed. II. (Maynard), 602, 603; Fitz. Abr. *Covenant*, passim. This effect of covenant was preserved in the case of fines until a recent date; 1 Bl. Comm. 349, 350, and App. iv. § 1. As to a term of years, see Bract. fol. 220 a, § 1; Y. B. 20 Ed. I. 254; 47 Ed. III. 24; (cf. 38 Ed. III. 24); F. N. B. 145 M.; *Andrews' Case*, Cro. Eliz. 214; S. C. 2 Leon. 104; and as to chattels, see Y. B. 27 Hen. VIII. 16; Bro. Abr. *Feoffments al Uses*, pl. 16; Dyer, 55 (3); ib. 96 (40); ib. 162 (48); *Sharlington v. Strotton*, Plowd. 298, 309.

<sup>6</sup> Heusler, Gewere, 479 et seq. See Glanv. vii. c. 9, where the Church is shown to have the settlement of the question whether the will was reasonably made. Cf. ib. c. 1. § 3.

Church kept up for so long a time to assert jurisdiction in all matters of *fidei laesio*, it would seem that a ground for its interference might have been found in the *fiducia* which, as has been said, was of the essence of the relation, and which we find referred to in the earliest bills printed in the Chancery Calendars.

This is conjecture. But it seems clear that on some ground the original forum for devisees was the Ecclesiastical Court. Glanvill states that it belongs to the ecclesiastical courts to pass on the reasonableness of testamentary dispositions<sup>1</sup>, and, while he shows that the executor had the King's writ against the heir, gives no hint of any similar right of legatees or devisees against the executor. The Decretals of Gregory disclose that a little later the Church compelled executors to carry out their testator's will<sup>2</sup>. And Bracton says in terms that legatees and devisees of houses in town or of an usufruct could sue in the ecclesiastical courts<sup>3</sup>. As we have seen, in the case of houses in town the executor ceased to intervene, the ecclesiastical remedy against him became superfluous, and devisees obtained a remedy directly against deforciant in the King's courts. But with regard to legacies, although after a time the Chancery became a competing, and finally, by St. 20 & 21 Vict. c. 77, s. 23, the exclusive jurisdiction, as late as James I. 'the Lord Chancellor Egerton would say, the ecclesiastical courts were proper for legacies and sometimes send them thither<sup>4</sup>.'

These courts were unable to deal with uses in the fulness of their later development. But the chief instances of feoffment upon trust, other than to the uses of a lost will or for distribution after death, of which there is any record until sometime after the Chancery had become a separate court under Edward III. were for the various fraudulent purposes detailed in the successive petitions and statutes which have come down to us<sup>5</sup>. It should be mentioned too, that there are some traces of an attempt by *cestuis que use* who were strangers to the feoffment to enforce the trust by way of a condition in their favour, and it seems to have been put that way sometimes in the conveyances<sup>6</sup>.

For a considerable time, then, it would seem that both feoffors and other *cestuis que use* were well enough protected. The first

<sup>1</sup> Glanv. vii. c. 6 & 8.

<sup>2</sup> Decret. Greg. III. Tit. 26. cap. 19. A. D. 1235.

<sup>3</sup> Bract. fol. 407 b, 61 a, b.

<sup>4</sup> *Nurse v. Bormes*, Choyce Cases in Ch. 48. See further *Glen v. Webster*, 2 Lee, 31. As to common law, see *Deeks v. Strutt*, 5 T. R. 690; *Atkins v. Hill*, Cowper, 284, and cases cited.

<sup>5</sup> Petition of Barons, c. 25 (Hen. III. A. D. 1258), Annals of Burton (Rolls ed.), 422; id. Stubbs, Select Charters; Irish Stat. of Kilkenny, 3 Ed. II. c. 4; Stat. 50 Ed. III. c. 6; 1 R. II. c. 9; 2 R. II. Stat. 2, a. 3; 7 R. II. c. 12; 15 R. II. c. 5; 4 Hen. IV. c. 7. See also Statute of Marlebridge, 52 Hen. III. c. 6.

<sup>6</sup> 2 Rot. Parl. 79 (3 R. II. nos. 24, 25); ib. 60, 61 (2 R. II. nos. 25, 26).

complaint we hear is under Henry IV. It is of the want of a remedy when property is conveyed by way of *affiance* to perform the will of the grantors and feoffors and the feoffees make wrongful conveyances<sup>1</sup>. As soon as the need was felt, the means of supplying it was at hand. Nothing was easier than for the ecclesiastics who presided in Chancery to carry out there, as secular judges, the principles which their predecessors had striven to enforce in their own tribunals under the rival authority of the Church. As Chancellors they were free from those restrictions which confined them as churchmen to suits concerning matrimony and wills. Under Henry V. we find that *cestuis que use* had begun to resort to equity<sup>2</sup>, whereas under Richard II. the executors and feoffees of Edward III. had brought their bill for instructions before the Judges in Parliament<sup>3</sup>. In the next reign (Henry VI.) bills by *cestuis que use* become common. The foundation of the claim is the *fides*, the trust reposed and the obligation of good faith, and that circumstance remains as a mark at once of the Teutonic source of the right and the ecclesiastical origin of the jurisdiction.

If the foregoing argument is sound, it will be seen that the doctrine of uses is as little the creation of the subpoena, or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilization which the common law was too archaic to deal with. It is true, however, that the form of the remedy reacted powerfully upon the conception of the right. When the executor ceased to intervene between testator and devisee the connection between devises and uses was lost sight of. And the common law courts having refused to protect even actual pernors of profits, as has been explained, the only place where uses were recognized by that name was the Chancery. Then, by an identification of substantive and remedial rights familiar to students, a use came to be regarded as merely a right to a subpoena. It lost all character of a *jus in rem*, and passed into the category of choses in action<sup>4</sup>. I have shown elsewhere the effect of this view in hampering the transfer of either the benefit or burden of uses and trusts<sup>5</sup>.

<sup>1</sup> 3 Rot. Parl. 511 (4 Hen. IV. no. 112. A.D. 1402).

<sup>2</sup> *Dodd v. Browning*, 1 Cal. Ch. xiii; *Rothenhale v. Wyckingham*, 2 Cal. Ch. iii.

<sup>3</sup> 2 Rot. Parl. 60, 61 (2 R. II. nos. 25, 26).

<sup>4</sup> Co. Lit. 272 b; Bacon, Reading on Stat. of Uses, Works (ed. Spedding), vii. p. 398.

<sup>5</sup> The Common Law, ch. xi; see especially pp. 399, 407-409, and, in addition to the books cited on p. 408, notes 1 and 2; Fitz. Abr. *Subpœna*, pl. 22; *Dalmeire v. Barnard*, Plowden, 346, 352; *Pawlett v. Attorney-General*, Hardres, 465, 469; Co. Lit. 272 b; W. Jones, 127.

II. *Contract.*

I must now say a few words of the only other substantive doctrine of which I have discovered any trace in the first period of English Equity. This is a view of Contract, singularly contradicting the popular notion that the common law borrowed Consideration from the Chancery. The requirements of consideration in all parol contracts is simply a modified generalization of the requirements of *quid pro quo* to raise a debt by parol. The latter, in certain cases at least, is very ancient, and seems to be continuous with the similar doctrine of the early Norman and other continental sources which have been much discussed in Germany<sup>1</sup>.

I may remark by way of parenthesis that this requirement did not extend to the case of a surety, who obviously did not receive a *quid pro quo* in the sense of the older books and yet could bind himself by parol from the time of the *Somma* to Edward III. and even later where the custom of various cities kept up the ancient law<sup>2</sup>. Sohm has collected evidence that suretyship was a formal contract in the time of the folk laws, in aid of his theory that the early law knew only two contracts; the real, springing from sale or barter and requiring a *quid pro quo*; and the formal, developed from the real at an early date by a process which has been variously figured<sup>3</sup>. I do not attempt to weigh the evidence of the continental sources, but

<sup>1</sup> *Somma*, ii. c. 26, §§ 2, 3, in 7 *Lodewig*, *Reliq. Manuscript.* pp. 313, 314; *Grand Coutumier*, c. 88 & 90; *Statutum Walliae*, 12 Ed. I: 'Si vero Debitor venerit, necesse habet Actor exprimere petitionem, et rationem sue petitionis, videlicet, quod tenetur ei in centum marcia, quas sibi accommodavit, cujus solutionis dies preterit, vel pro terra, vel pro equo, vel pro aliis rebus seu castellis quibuscunque sibi venditis, vel pro arragis redditus non provenientes de tenementis, vel de aliis contractibus,' &c. Y. B. 39 Ed. III. 17, 18, 'iasint il est *quid pro quo*;' 3 Hen. VI. 36. pl. 33; 7 Hen. VI. 1. pl. 3; 9 Hen. VI. 52. pl. 35; 11 Hen. VI. 35. pl. 30 at fol. 38; 37 Hen. VI. 8. pl. 18. See also 'Justa debendi causa' in *Glanv.* x. c. 3; *Dial. de Scacc.* ii. c. 1 & 9; *Fitz. Abr. Dett.* pl. 139; Y. B. 43 Ed. III. 11. pl. 1. Form of Count given by 1 Britton (ed. Nichols), 161, 162. pl. 12; Y. B. 20 & 21 Ed. I. App. 488, 'Marchandise' ground of debt. Sohm, *Knechtschliessung*, p. 24; 1 *Franken, Fransi.* Pfandr. § 4. p. 43; *Schulte, Reichs- u. Rechtsgesch.* § 156 (4th ed.), p. 497. Consideration is first mentioned in equity in 31 Hen. VI., *Fitz. Abr. Subpena*, pl. 23; Y. B. 37 Hen. VI. 13. pl. 3, and by the name *quid pro quo*. So in substance as to *assumpsit*; Y. B. 3 Hen. VI. 36. pl. 33.

The interpretation of *Flota*, ii. c. 60. § 25 by the present writer in *The Common Law*, 266, is rightly criticised in *Pollock, Contr.* (3rd ed.), 266, as appears by comparing the more guarded language of *Bracton*, 15 &.

<sup>2</sup> *Somma*, i. c. 62, ii. c. 24; 7 *Lodewig*, 264, 309; *Grand Coutumier*, c. 89 (cf. *Bract. fol.* 149 b, § 6); *The Common Law*, 260, 264. See, beside authorities there cited, F. N. B. 122 K; ib. I in marg., 137 C; Y. B. 43 Ed. III. 11. pl. 1; 9 Hen. V. 14. pl. 23. *Car. M. Cap. Langob.* A. D. 813. c. 12, 'Si quis pro alterius debito se pecuniam suam promiserit redditurum in ipsa promissione est retinendus,' cited *Löning, Vertragsbruch*, 62, n. 1.

In 2 *Gesta Hen. II.* (Ben. Abbas, Rolls ed.), 136, sureties make oath to surrender themselves if the agreement is broken. Sohm, *Knechtschliessung*, 48, goes so far as to argue that the oath was simply one substituted for the *Salic* formal contract. But I find no evidence that the oath was necessary in England, unless for ecclesiastical jurisdiction. 2 *Gesta Hen. II.* p. 137.

<sup>3</sup> See, e. g., 1 *Franken, Fransi.* Pfandr. § 16. pp. 209-216; § 18. pp. 241 et seq.; ib. 261-266.



in view of the clear descent of suretyship from the giving of hostages, and the fact that it appears as a formless contract in the early Norman and Anglo-Norman Law, I find it hard to believe that it owed its origin to form any more than to *quid pro quo*. Tacitus says that the Germans would gamble their personal liberty and pay with their persons if they lost<sup>1</sup>. The analogy seems to me suggestive. I know no warrant for supposing that the *festuca* was necessary to a bet.

I go one step further, and venture hesitatingly to suggest that cases which would now be generalized as contract may have arisen independently of each other from different sources, and have persisted side by side for a long time before the need of generalization was felt or they were perceived to tend to establish inconsistent principles. Out of barter and sale grew the real contract, and if the principle of that transaction was to be declared universal, every contract would need a *quid pro quo*. Out of the giving of hostages, familiar in Cæsar's time, grew the guaranty of another's obligation, and if this was to furnish the governing analogy, every promise purporting to be seriously made would bind. But the two familiar contracts kept along together very peaceably until logic, that great destroyer of tradition, pushed suretyship into the domain of covenant, and the more frequent and important real contract succeeded in dividing the realm of debt with instruments under seal<sup>2</sup>.

To return to Equity. In the Diversity of Courts (*Chancery*) it is said that 'a man shall have remedy in Chancery for covenants made without specialty, if the party have sufficient witness to prove the covenants, and yet he is without remedy at the common law.' This was in 1525, under Henry VIII., and soon afterwards the contrary was decided<sup>3</sup>. But the fact that a decision was necessary confirms the testimony of the passage quoted as to what had been the tradition of the Chancery. I do not propose to consider whether thus broadly stated it corresponded to any doctrine of early law, or whether any other cases could be found, beside that of the surety, in which a man could bind himself by simply saying that he was bound. For although the meaning of the tradition had been lost in the time of Henry VIII. when the text-book spoke of covenants generally, the promise with which Equity had dealt

<sup>1</sup> Germ. 24.

<sup>2</sup> Y. B. 18 Ed. III. 13. pl. 7; 44 Ed. III. 21. pl. 23; 43 Ed. III. 11. pl. 1. So warranty, which had been merely an incident of a sale (*Lex Salica*, c. 47; *Glanv.* x. c. 15 & 17), came to be looked at as a covenant, Y. B. 44 Ed. III. 27. pl. 1; and at a later date bailment was translated into contract. By way of further illustration, I may add that in modern times Consideration has still been dealt with by way of enumeration (see e. g. 2 Bl. Comm. 444; 1 Tidd's Practice, ch. 1, as to *assumpsit*), and only very recently has been resolved into a detriment to the promisee, in all cases.

<sup>3</sup> Cary, Rep. in Ch. 5; Choyce Cases in Ch. 42.

was a promise *per fidem*. Thus, under Edward IV.<sup>1</sup>, a subpoena was sued in the Chancery alleging that the defendant had made the plaintiff the procurator of his benefice and promised him *per fidem* to hold him harmless for the occupation, and then showing a breach. The Chancellor (Stillington) said that 'in that he is damaged by the non-performance of the promise he shall have his remedy here.' And to go back to the period to which this article is devoted, we find in the reign of Richard II. a bill brought upon a promise to grant the reversion of certain lands to the plaintiff, setting forth that the plaintiff had come to London and spent money relying upon the *affiance* of the defendant, and that as he had no specialty, and nothing in writing of the aforesaid covenant, he had no action at the common law. This is all the direct evidence, but slight as it is, it is sufficient to prove an ancient genealogy, as I shall try to show.

Two centuries after the Conquest there were three well-known ways of making a binding promise; Faith, Oath, and Writing<sup>2</sup>. The plighting of one's faith or troth here mentioned has been shown by Sohm and others to be a descendant of the Salic *Fides facta*, and I do not repeat their arguments<sup>3</sup>. It still survives in that repertory of antiquities the marriage ceremony, and is often mentioned in the old books<sup>4</sup>.

Whether this plighting of faith (*fides data*, *fides facta*) was a formal contract or not in the time of the Plantagenets, and whether or not it was ever proceeded upon in the King's courts, it sufficiently appears from Glanvill and Bracton that the royal remedies were only conceded *de gratia* if ever<sup>5</sup>. The royal remedies were afforded at first only by way of privilege and exception, and, as I have already shown, never extended to all the ancient customs which prevailed in the popular tribunals. But if the King failed the Church stood ready. For a long time, and with varying success, it

<sup>1</sup> Y. B. 9 Ed. IV. 4. pl. 11; Fitz. Abr. *Subpoena*, pl. 7.

<sup>2</sup> Compare Letter of Gregory IX. to Henry III., Jan. 10, 1233, in 1 Royal Letters, Henry III. (Rolls ed.), p. 551, 'Possessiones . . . fide ac juramentis a te praestitis de non revocandis eadem, sub litterarum tuarum testimoniis concessisti,' with Sententia Rudolphi Regis, A. D. 1277, *Partis Monumenta*, Leges ii. p. 412; 'Quaesivimus . . . utrum is qui se datione fidei vel juramento corporaliter prestitio, vel patentibus suis litteris, ad obsequium vel solutionem alicujus debiti ad certum terminum obligavit, nec in ipso termino adimplevit ad quod taliter se adstrinxit de jure posset . . . per iudicium occupari? Et promulgatum extitit communiter ab omnibus, quod is, qui modo predicto . . . promissio non paruit, valeat, ubicumque invenitur, auctoritate iudiciaria conveniri.'

<sup>3</sup> *Lex Salica* (Merkel), c. 50; *Lex Ripuaria*, c. 58 (60). § 21; Sohm, *Eheschliessung*, 48, 49, notes; 1 *Franken, Francia Pfand*, 264 n. 2.

<sup>4</sup> Kadmer (Rolls ed.), 7, 8, 25; *Dial. de Scacc.* ii. c. 19; 2 *Gesta Hen. II.* (Ben. Abbas), 134-137; 3 *Roger Hoved.* (Rolls ed.), 145; *Glanv.* vii. c. 18; x. c. 12; 1 *Royal Letters, Henry III.* (Rolls ed.), 308; *Bract.* 179 b. Cf. *id.* 175 a, 406 b, &c.; *Reg. Majest.* ii. c. 48. § 10; c. 57. § 10; *Abbrev. Plac.* 31. col. 1 (2 *Joh. Norf. rot.* 21); 22 *Ass.* pl. 70. fol. 101.

<sup>5</sup> *Glanv.* x. c. 8; *Bract.* 100 a.

claimed a general jurisdiction in case of *laesio fidei*<sup>1</sup>. Whatever the limit of this vague and dangerous claim it clearly extended to breach of *fides data*. And even after the Church had been finally cut down to marriages and wills, as shown in the last note, it retained jurisdiction over contracts incident to such matters for breach of faith, and, it seems, might proceed by way of spiritual censure and penance even in other cases<sup>2</sup>.

Thus the old contracts lingered along into the reign of Edward III. until the common law had attained a tolerably definite theory which excluded them on substantive grounds, and the Chancery had become a separate Court. The clerical Chancellors seem for a time to have asserted successfully in a different tribunal the power of which they had been shorn as ecclesiastics, to enforce contracts for which the ordinary King's Courts afforded no remedy. But, I think, I have now proved that in so doing they were not making reforms or introducing new doctrines, but were simply retaining some relics of ancient custom which had been dropped by the common law, but had been kept alive by the Church.

O. W. HOLMES, JUN.

<sup>1</sup> The fluctuations of the struggle may be traced in the following passages: 'Item generaliter omnes de fidei laesione vel juramenti transgressionem questiones in foro ecclesiastico tractabantur.' A.D. 1190. 2 Diceto (Rolls ed.), 87; 2 Matt. Paris. Chron. Maj. (Rolls ed.), 368. 'Placita de debitis quas fide interposita debentur vel abque interpositione fidei sint in justitia Regis.' Const. Clarend. c. 15; Glanv. x. c. 12; Letter of Thomas a Becket to the Pope, A.D. 1167, 1 Rog. Hoved. (Rolls ed.), 254. Agreement between Richard and the Norman clergy in 1100, Diceto and Matt. Par. ubi supra. As to suits for breach of faith, outside of debts, in the Courts Christian, circa 1200, Abbrev. Plac. 31. col. 1 (2 Joh.), Norf. rot. 21. 'Prohibetur ecclesiasticus judex tractare omnes causas contra laicos, nisi sint de matrimonio vel testamento.' A.D. 1247, 4 Matt. Paris (Rolls ed.), 614. Resistance to this, Annals of Burton (Rolls ed.), 417, 423; cf. ib. 256. But this prohibition fixed the boundaries of ecclesiastical jurisdiction.

<sup>2</sup> 22 Lib. Ass. pl. 70. fol. 101. Cf. Glanv. vii. c. 18, 'propter mutuum affidavitonem quas fieri solet.' Bract. fol. 175 a. 406 b, 407, 412 b; Y. B. 38 Hen. VI. 29. pl. 11. But covenant was the only remedy if the contract had been put in writing; Y. B. 45 Ed. III. 24. pl. 30.

## ON LAND TENURE IN SCOTLAND AND ENGLAND.

## I.

I PROPOSE to compare and contrast some salient points in the land rights of England and Scotland. In doing so I shall assume an acquaintance on the part of the reader with the leading features of English land rights; and indicate the traits of Scotch tenure by showing what they have in common with and wherein they differ from these.

It is commonly supposed by legal practitioners that the systems of Scotch and English land laws are utterly foreign to each other. The Scotch lawyer, on first acquaintance with an English abstract of title, looks upon it as bewildering, and at best showing very questionable evidence of security. The English conveyancer finds in the Scotch deeds a mass of technicalities which are unintelligible, and straightway hands over the bundle of original documents for the perusal of a Scotch lawyer. Each would be hardly prepared to learn that the principles of tenure and title in the two countries are radically identical; still less to be told that his first impression is due to his own want of thorough and historical knowledge of the one system with which he professes to be conversant.

Yet the systems are fundamentally the same, and every point of divergence has an ascertainable history. I am not speaking of the archaic identity of usages which are recognised as having prevailed in most countries where ancient communities of plough cultivators have settled on the land. These, for causes to which I shall hereafter advert, have, in Scotland, left few marks upon the actual tenancies of the present day; although they are strongly traced in still extant rentals, and in the descriptions of land in recorded titles. In such documents the expressions 'ploughland,' 'oxgate,' 'husbandland,' 'carucate' are familiar, and their relations to the taxation known as the 'old extent' are clearly marked. The more mysterious 'davach' of the north-eastern counties of Scotland may yet afford material for the curious enquirer. Professor Innes<sup>1</sup> identifies the area as equal to four ploughlands—as much as four ploughs (of eight oxen each) could till in a year—each ploughland being equal to eight oxgates (about thirteen acres each), and to a forty-shilling land of 'old extent.' The 'davach' specially belongs

<sup>1</sup> *Scotch Legal Antiquities*, pp. 272-285.

to the fertile district drained by the rivers falling into the Moray Firth, a region fit for the poet's description of the ancient Tibur—*Argeo positum colono . . . Ver ubi longum tepidasque praebet Jupiter brumas*. Such a region may well be imagined to have been the seat of a very early colony of plough-cultivators; and it is tempting to guess at the derivation as suggesting whence they came. Mr. Skene guesses at a Celtic one, but Professor Innes, more cautious, gives up the derivation in despair.

Such fascinating speculations are however beyond the scope of this essay, which is to treat of the identity and divergence of Scotch and English tenures as a matter of recent history, and to show that some acquaintance with each system is valuable for the lawyer, and still more for the legislator, who desires an intelligent and thorough knowledge of either. It would be easy to show, for instance, that an English lawyer who was familiar with the leading features of a Scotch title would not have committed the blunder made by the authors of the Vendor and Purchaser Act, 1874, by the 7th section of which (until rescinded the following year) the security given by the *legal estate* was imperilled. He would have known that the 'legal estate' of English law is bound up with the 'seizin'—a fundamental conception of the feudal system which is the common source of the land tenures of both countries; and would have seen clearly how to get rid of certain anomalies of English law without interfering with this radical notion. Again, an English lawyer, looking by way of contrast at the Scotch law, will learn to appreciate the rule of his own law that possession is evidence of seizin in fee, and the principle of prescription (practically absent from Scotch law), by which possession may mature into title. On the other hand, Scotch law is much indebted for recent improvements to the contrast afforded by the modern English system. It is not long since a Scotch Lord-Advocate who presumably had acquired some knowledge of English law—for he was called to the English bar—obtained the passing of a very useful Act<sup>1</sup> by which some of the obvious mischiefs of the unmitigated feudal law up to that time prevailing in Scotland were abolished, without interfering with the use of the feudal machinery as a convenient means of creating and recording perpetual holdings of land.

To show the intimate connection between the two countries which for a time induced a similarity in administrative machinery, and almost an identity of land laws, it is necessary to recall some points of early Scotch history, which may not be familiar to the

<sup>1</sup> Conveyancing Act (Scotland), 1874.

recollection of every English reader. The period of closest relations begins with the immigration of English who accompanied the expedition of Malcolm Canmore against Macbeda in 1054. This *Macbeila*—adopting the spelling used by Mr. Hill Burton to mark a person whom the scanty records of contemporaneous history present in a very different light from the *Macbeth* so well known to us—was Maarmor of Ross, the independent ruler of a district stretching westwards from the Moray Firth. King Duncan, when on the territory of the Maarmor with aggressive designs, met his death at the hands of Macbeda, who—in right (apparently) of his wife, the granddaughter of a former King of Scotland—ascended the Scotch throne. There is nothing to show that Macbeda's succession, in preference to Duncan's son, who was a minor, was not in accordance with the usage of the time. Nor is it surprising that the boy Malcolm, growing up among his English cousins, should be taught a different theory, and should, when he arrived at maturity, with the aid of these relatives, proceed to enforce his claim to the Scotch crown.

The expedition set out in 1054, and engaged the forces of Macbeda at Dunsinnan. This battle was not decisive. Macbeda retreated in the direction of the country originally held by him as Maarmor of Ross, and was killed at Lumphanan in Aberdeenshire. Nor did the contest end here. Two years elapsed between the setting out of the expedition and the final success of Malcolm; and the English who had aided him in this protracted struggle were doubtless conveniently rewarded with grants of the earldoms and lands of the losing faction. This seems to explain the undoubted fact that in all the early extant Scotch charters—of which there are numerous specimens of David I (1124–1153)—the names of grantees and witnesses, even in the case of lands so far north as the district of Moray, are invariably either Norman or English. Another important effect of the success of Malcolm was to settle the rule of succession of the crown; so far, at all events, that a son, though minor, must succeed in preference to a collateral. The feudal rule of primogeniture became established in the succession of Malcolm's sons, and this doubtless influenced the rule of succession in lands held by charter from the king, as well as in those held of subjects.

The Norman conquest of England sent a stream of new emigrants into Scotland. Amongst these arrived (in 1068) Edgar the Ætheling, the heir of the Saxon line of kings, with his mother and sisters, one of whom, Margaret, was afterwards married to Malcolm. By this marriage there were three sons, Edgar, Alexander, and David, each of whom eventually, in succession, ascended the throne of Scotland;

and a daughter, Matilda, who afterwards became the wife of Henry I, King of England.

Malcolm reigned for forty-six years, during which Scotland seems to have enjoyed a period of internal quiet. There was fighting with England, carried on for the most part within the English border; and it was in one of these expeditions that Malcolm lost his life. Tradition, and a rude cross, still point out the spot, near Alnwick Castle, where he fell (1093). After his death, Scotland seems to have become hot for the English settlers; and Edgar had to fight his way to the throne, again with the help of English. Edgar died in 1107, leaving it as a bequest or injunction to his brother Alexander who succeeded him, that the border province of Cumbria should be ruled by their younger brother David.

The consequence was that David, in his earlier years, and before succeeding, as he ultimately did, to the throne of Scotland, became bound by intimate relations with Normans both as neighbours and as his own feudal dependants. He married Matilda, heiress of Waltheof Earl of Northumberland, and in her right succeeded to this earldom in 1108. Much of his time was spent about the English Court. He succeeded his brother Alexander as King of Scotland in 1124. He was hardly established on the throne when the irrepressible Maarmor of Ross had to be reckoned with. The insurrection, or invasion, was suppressed with the aid of Norman adventurers, and again we find the possessions in the Maarmor's territory parcelled out amongst these strangers. Throughout Scotland indeed we find a large proportion of the Crown vassals with Norman names.

During the reign of David in Scotland, commenced the unsettled condition of England due to the contest for the succession on the death of Henry I. David supported the cause of his niece, Henry's daughter Matilda, against Stephen. He appears at the head of an invading army, a motley host of Scots, English, and *French* (or Normans), men of Galloway (perhaps of Pictish race), and men of Norwegian or Danish race from the Orkneys. This heterogeneous army was engaged by the forces of Stephen, consisting of a compact Norman phalanx. The ensuing fight described as taking place '*ad Standardam*,' enlivens the page of history with the enthusiastic description of an eyewitness. The compact phalanx of Normans were victorious, but the more numerous army from Scotland were strong enough to be troublesome, and the expedition ended in a treaty not unfavourable to the Scotch King. The moral effect of the battle must have been all in favour of the Normans, and probably went far to repress any manifestation of the chronic feeling of resentment against these strangers, of which we from time

to time see the traces in Scotland. In Galloway however (a country where the King's writ ran with difficulty) this resentment took an acute form; and from this time Norman names become conspicuously scarce there.

In Scotch annals, David I. maintained the character of a victorious and successful Prince. The power of the Maarmor seems to have been quelled for a time, and doubtless this had its effect in maintaining the quiescence of the Central and Western Highlands. And as David's military operations were mostly carried on in the outskirts of or beyond the limits of his dominions, it is probable that the country generally enjoyed a fair measure of substantial prosperity. The foundation and endowment of the monasteries, which was characteristic of this reign, doubtless gave a stimulus to cultivation by free tenants under the auspices of these kindly landlords. The feature of the reign however to which I now call attention, is that the English (Normans or Saxons) became widely established on the land as a military caste. This probably did not at once interfere with the cultivation and mode of holding of the actual occupiers; but the way was prepared for the introduction of the feudal tenures which had already grown into a system on the Continent of Europe, and had become, through the Norman Conquest, widely prevalent in England. The Crown charters of this reign, however, still retain the short and simple forms of Saxon rather than Norman grants.

David I. died at Carlisle in 1153, and next to him reigned in succession his two sons, Malcolm the Maiden, and William the Lion. The great political event of this last-mentioned reign was the capture by the English, in 1174, of the Scottish King; and his ransom on the terms of acknowledging the complete feudal superiority of the King of England over the kingdom of Scotland. The transaction is recorded in a document which has been considered a triumph of skill in feudal draftsmanship. The concession was not however destined to be lasting, even on parchment. On the accession of Richard Cœur de Lion to the English throne, one of his first acts was to discharge *simpliciter* the obligation so extorted.

William the Lion was succeeded in 1214 by his son Alexander II, then a youth of seventeen. In the early part of this reign we hear of fighting on the English border, but diplomacy steps in and a joint Commission to settle the marches of the two kingdoms had a good effect in promoting peace in this quarter. There was however again trouble in Moray with a representative of the Maarmors, and with the Celts in the Western and Central Highlands. Alexander continued with success the policy of planting Norman adventurers



upon the land of these unsettled districts. In the latter part of this reign we find mention of the muster of a large force in defence of the country against the army of King Henry III. The demonstration on both sides however passed without actual fighting; and the two Kings came to an agreement in the 'treaty of Newcastle,' by one term of which the young prince Alexander was to become the husband of Henry's daughter Margaret.

The reign of Alexander II. closes with an expedition made by him to enforce the acknowledgment of feudal supremacy from the practically independent ruler of Argyle and the Isles. He died (in 1249) on the small Island of Kerrera opposite Oban. At his death his son, who succeeded as Alexander III, was about eight years of age.

The Coronation of Alexander III. is said to have taken place with great ceremony; and shortly afterwards the marriage between the children pursuant to the treaty of Newcastle was celebrated at York. The time of the young King's minority is filled with intrigues amongst the powerful Norman barons related collaterally to the late King. In 1260 was born of the Royal marriage a daughter, Margaret. A few years later followed the great event of this reign; a brief and final contest with the Norsemen under King Haco, who brought a fleet, with a powerful force, for the invasion of Scotland. The Armada was anchored in the broad sea-way between the Ayrshire coast and the Isle of Arran. The weather was stormy and the ships suffered considerable damage. A skirmish on the coast at Largs was followed by the descent of the main army, who were totally defeated by a hastily collected force on the Scotch side. The remnant of the fleet made its way back, not without further losses, to Orkney, where Haco died in 1263. The result of this unsuccessful invasion was to consolidate the power of the Scotch King over the Highlands and Western Islands. The rights of Norway over the Islands were formally ceded in 1266.

Soon after the battle of Largs a son had been born to the Scotch King. His daughter, Margaret, was, in 1281, married to Eric of Norway; and thus was established a bond of amity between the Kings of Norway and Scotland. Shortly afterwards the son of the Scotch King was married to a daughter of the Earl of Flanders.

It now seemed as if Scotland was destined to enter on a course of continued prosperity and stable government. Even were it suspected that Edward, now on the throne of England, was already contriving the means of fortifying the old shadowy claim to feudal superiority, this could hardly have been perceived as a cloud upon the horizon. The prospect was quickly changed, in

1283, by the death of the Princess, leaving a newly-born daughter, followed in a few months by the death of the King's only son. The grounds for anxiety are pithily stated by Mr. Hill Burton<sup>1</sup>. Apart from the claims of the infant heiress, which, according to the precedents of the time, were not free from doubt, 'it was known that there were several expectants of the succession, but they were all distant collaterals. What was far more serious, however, they were all Norman barons with possessions in England as well as in Scotland. There was no doubt, although Norman names are so conspicuous in great State transactions in Scotland, that there was a strong middle class, backed by a peasant and burgher class, who disliked the Norman intruders, and felt a horror of any subjection to a Norman government such as England had now been suffering under for two hundred years. To them it appeared that Scotland was drifting towards such a fate, with nothing at present existing but the frail child away in Norway to protect them. Whether it should be the English King himself, or one of those Norman magnates surrounding his throne, that was to rule, would make little matter; it would still be Norman rule.' The Estates promptly met at Scone, and resolved that, saving the event of a posthumous child being born to the late Prince, the succession should devolve on the Princess of Norway.

On the 12th of March, 1286, long remembered as the darkest day in Scotland's annals, Alexander III. was killed by a fall from his horse. In 1290 the Princess, Maid of Norway, died at Orkney—on the way to Scotland; and the country was committed to a disputed succession, to be followed by the intervention of Edward, the temporary subjugation of Scotland, and the War of Independence; an ordeal from which the Scottish kingdom and people emerged victorious and independent, but with a land peeled and well-nigh desert.

The above brief outline of a period which, by way of contrast, is designated in the formal style of inquests of heirship of the following century as *tempore pacis*<sup>2</sup>, will suffice to show the intimate

<sup>1</sup> Hist. of Scotland, vol. ii. p. 116.

<sup>2</sup> *Inquisitio generalis* (temp. Robert II.); *Registrum brevium* in the Bute MS. Nos 51 and 53. One head of the inquiry is: 'Et quantum valent dictae terrae annui redditus cum pertinentibus per annum et quantum valuerunt *tempore pacis*.' This style was continued up to recent times in the heads of the *Inquest* or *Brieve of Service*; and the expression '*tempore pacis*' has been a puzzle to the Institutional Writers. Sir Thomas Craig (*Jus Feudale*, ii. 17. 36) says that the meaning has often been in controversy among very learned persons, none of whom have satisfactorily explained it. He hazards an explanation of his own, to the effect that it refers to the time of our ancestors, 'qui nunc in pace sunt'! Lord Stair (iii. 5. 38) makes a better guess, but he is evidently at sea. When once we know that the style of writ dates back to the time of Robert II. and may possibly have been settled still earlier, the explanation becomes simple: and we also see the reason why the inquiry was answered by reference to the 'old extent'

relations then held by Scotland towards England, both in the persons of the reigning families, and in the immediate tenure-holders under the Crown. That the Norman tenure-holders should be closely followed by the feudal lawyer is consistent with what we know of the constitution of feudal tenures throughout Europe. Already the tenure of the great estates, in both countries, was regulated by feudal principles. Probably in Scotland as well as in England, in the tenure of small estates, these principles struggled with and often gave way to local usages. The gradual modelling of all estates in Scotland, large and small, on the feudal type, was the work of a later period.

Throughout Europe, an invariable mark of the feudal tenure was the formal 'Investiture;' and this must, within the period here spoken of, have become of general use in Scotland<sup>1</sup>. The late survival of this ancient formality is one of the curiosities of Scotch law. A graphic description of the ceremony in its latest days has been placed on record by one who, while having as an apprentice of the law occasionally taken part in it, was capable of fully appreciating the significance of its details. The pecuniary transaction being concluded, and the feu-charter signed, the Investiture follows:—'A small group of men appear on the ground itself. One takes from his pocket the actual feu-charter; he is the attorney or representative of the purchaser or vassal. He hands it to another, and desires him to read from it the precept of sasine, or the direction which the superior therein gives for giving his new vassal seisin or absolute possession of the land. The receiver of this document—who, like the giver of it, is probably a clerk in the office where the business is transacted—represents the bailie, bailiff, or executive officer of the superior's seignorial court. He receives the precept of his lord and master with due reverence and obedience. Giving effect to its directions, he would stoop down, and, lifting a stone and a handful of earth, hand these over to the new vassal's attorney, thereby conferring on him "real, actual, and corporeal possession" of the fief. The next duty of the purchaser's attorney was what was termed to "take instruments," to enter a solemn protest that his client's infeftment, infeofment, or placing in the fief, was completed, and this he did by handing a piece of money—the canonical sum was a shilling—to a notary public in attendance. This was not the

(the valuation made in the time of Alexander III.), the amount of which, in later times, was proved by the *retour* (the return made by the sheriff) to a former writ of inquiry.

<sup>1</sup> Stair (Inst. iv. 3. 4), on the authority of Craig (ii. 2. 18), says that instruments of sasine were introduced by James I. (of Scotland), on his return from captivity in England. This theory, in itself incredible, is disposed of by Erskine, a much better authority on points of historical law, who says (Inst. iii. 3. 34) that many instruments of sasine much older were extant in his days.

least significant part of the ceremony, as bearing it back into the furthest recesses of the feudal system, when it acted in conjunction with the imperial. The Empire left to its spiritual half the functions of the scribe with the preservation of records. To carry out this function, certified notaries were distributed over Christendom, and divided into districts according to the organisation of the Church. The gentleman who receives the shilling in this instance is a Notary Public of the Holy Roman Empire. His doquet or recorded notandum of the proceedings is written in the language of Rome, and in a country where the establishment is Presbyterian, and the ecclesiastical division is into presbyteries and synods, he designs himself according to the episcopal diocese of the old Romish Church for which he is licensed, as *Diocesis Moravicusis*, or *Diocesis Andreanopolitani, notarius publicus*. We shall find afterwards, at the outbreak of the war of independence, that when Edward I. professed to take possession of Scotland as lord paramount, in order that he might give the crown to the true heir, the facts of the transaction were attested exactly in the same manner by a Notary Public of the Holy Roman Empire<sup>1</sup>. To complete the picture, we must imagine the presence of the young writer's apprentice, and future historian of Scotland—a quaint figure even then—released from the drudgery of office-work for an hour in the open air. He assists, not without a sense of the humour of the transaction, in gravely employing for the transfer of a patch of land for a suburban villa the formalities used in medieval Europe for asserting the title to a kingdom; and sees in the barefooted urchins whom the oddity of the ceremony has attracted to the spot, the *Parcs Curiae*—the parliament of vassals attached to the old seignorial court—who take a part in the investiture, as witnessing the rights conferred on the new vassal and consenting to receive him into their community.

The form of the feu-charter, which, as we have seen, in the time of David I. emulates the brevity of the grants of Saxon kings, did not all at once attain the elaborate form of later times. The various rights detailed in the *tenendas* clause of later charters were left to be implied from the existing customs whatever they were. The Norman landholders were still accounted strangers and guests, and did not yet venture to rivet the chains of their tenures too tightly. We do not find extant the original of any grant of this period expressly erecting lands 'in baroniam,' nor *tenendas* 'cum fossâ et furcâ'—'pit and gallows.' Yet, whether by the express terms of the charter or by the custom of already existing manors, these

<sup>1</sup> Burton, *Hist. of Scotland*, vol. i. p. 397, note. The ceremony of infeftment on the lands was abolished, and a simple entry in the Register of Sasines substituted for it, by Act of Parliament in 1847.

regalia of the feudal baron are declared on high authority to have been included in a grant of William the Lion. A papal bull of the year 1182<sup>1</sup> confirms the rights of the monks of Arbroath. Besides the manorial franchises of *soc sac thol them* and *infangthief* (usual incidents to both English and Scotch manors) the monks are declared to hold their lands 'cum furcâ et fossâ,' and likewise to have '*examen aquae, ferri calidi et duelli*;' a form adapted to the religious character of the grantees. It seems probable, however, that the concession of the powers of pit and gallows in the hands of barons was not usual at the time here spoken of. It was in the later and darker times of baronial tyranny that they became common as appurtenances to a tenure of land<sup>2</sup>.

In the time of the Alexanders, the powers of the Crown were doubtless sufficient to supersede criminal jurisdiction, involving life and limb, at the hands of the barons. Two justiciars, one for Scotland proper (i.e. north of Forth) and the other for Lothian and the country south of Forth, were the great ministers of justice; and the sheriffs and crownors exercised a provincial authority circumscribed by law, or by their special commissions from the King or his justiciar. Already there are signs of a tendency to grant to the sheriffs or crownors charters of their offices. It does not appear that any popular claim of right prevented these officers from holding pleas of the Crown; but the Crown in regard to such pleas reserved the privilege and profits of fine and pardon.

In the administration of civil justice it is probable that, even at this early time, as was certainly the case not much later, forms were more elastic in Scotland than in England. Provided the defendants were 'summoned' in due form of law to answer to a complaint, the 'debaitable matter whereanent' might be set forth without strict regard to a precedent already sanctioned. But the English forms of writs (or *briefes*) are freely borrowed where they suit the case; and in the principal claims regarding land, as in the writs *de recto*, *de nova dissaisine*, and *de morte antecessoris*, the forms had already become stereotyped after the English models.

It is curious that a precise date cannot be now assigned to the survey and valuation so constantly referred to in later times as the 'Old Extent.' The Statute of Robert I. at Cambuskenneth in 1326 fixes the date as in the reign of Alexander III., and it probably belongs to the early part of that reign. Possibly it may have been the carrying out of a scheme planned by Alexander II. for defraying the costly levies and expeditions of which we hear toward the close

<sup>1</sup> Innes, *Scotch Legal Antiquities*, p. 54.

<sup>2</sup> The style was common in Scotch charters up to 1745. It is abolished by the Act 20 Geo. II. c. 43, which recites—what it may have been then convenient to believe—that the heritable jurisdiction imported by the words had long fallen into disuse.

of his reign. It remains on record as confirmatory evidence of the prosperous condition of Scotland in the time of these Kings.

Two Statutes of the reign of Alexander II. claim attention as bearing on the relation between the feudal holding and the actual possession and cultivation of the land. One of these is dated at Scone in the year 1214 (being the first year of this reign), and in the collection of laws which has come down to us is entitled '*De assedatione et aracione terrarum.*' The King '*cum communi consilio comitum suorum,*' for the benefit of the country, decrees that all rural cultivators (*rustici*) in the same village lands (*locis et villis*) which they have occupied in the past year shall this year carry on cultivation, and shall in no-wise delay, but fifteen days before Lady Day with all diligence begin to plough and sow their lands. Further, that husbandmen (*agrestes*) who have more than four cattle (*raccas*) must for their own sustenance take their lands under their lords and plough and sow them. Those who have less than five cattle (*raccas*) are to delve and sow the ground as best they can; and if they have oxen are to sell them to those who can use them for ploughing. Earls and other feudal tenants who refuse to act in accordance with the law are to forfeit eight cattle (*vaccas*) to the King or other feudal superior. If a bondman so refuses, his master is to take from him a cow and a sheep and thus compel him to obey the law. The Statute concludes with a quaint warning that those who are too slothful to plough in winter may beg in summer and will get nothing.

This Statute appears to point to some exceptional circumstance, perhaps a scarcity, in the preceding year. It seems an indication of emergency that the Earls (*comites*) are the only estate consulted. The Statute indicates nevertheless the exemption, or a step towards emancipation, of the agricultural class throughout the country from any services of ploughing and sowing in the demesne land of their lords. The enactment accords with the tradition, embodied in Wyntown's rhyming chronicle, that King Alexander brought a good breadth of land under plough, so that 'corn he gart be aboundand' (Burton, Hist. ii. 197 note). The credit is indeed given to Alexander III., but the tradition may well have been due to the policy of his predecessor.

In this connection may be cited two laws enacted in the previous reign, that of William the Lion. They are dated at Scone, probably in the year 1209, and are expressed to be made '*de communi consilio et deliberacione prelatorum comitum et baronum ac libere tenencium.*' The one (in the collection extant) bears the heading '*Omnes debent de suo vivere,*' and ordains '*quod comites barones et libere tenentes regni conservent pacem et justiciam in servis suis et*

quod vivant ut domini de terris et redditibus et firmis suis et non ut husbandi non ut pastores devastantes dominia sua et patriam cum multitudine ovium et bestiarum penuriam paupertatem et destructionem in populo Dei inducantes.' The other, headed 'De vita et honestate clericorum,' ordains 'quod viri ecclesiastici vivant honeste de fructibus redditibus et emolumentis ecclesiarum ita ut non sint husbandi neque pastores neque mercatores.' These laws are clearly intended to discountenance any attempts on the part of lords to extend the cultivation of their own demesne by the undue exaction of services from their rural tenants. Correlative to these enactments are stringent laws for reclaiming fugitive bondmen and carefully framed regulations with respect to mills and multures, which were regarded as an important source of profit—as indeed they long remained—to the lord.

The other Statute of Alexander II. above referred to, is one of a series of important laws dated in the year 1230, and made in presence of various magnates, including the two Justiciars. It bears the heading 'De dissaisina facta sine iudicio,' and enacts that 'If any man complains to the King or his Justiciar that his own lord or any other person has unjustly and without sentence of a Court dispossessed (*dissaisivit*) him of a tenement of which he was first vest and seized (*vestitus et saisitus*), and shall find sureties for prosecuting his complaint, the Justiciar, or the Sheriff by precept of the King or his Justiciar, shall make enquiry by worthy men of the country (*per probos homines patriae*) whether the complaint is just. And if on the enquiry and proof it is found to be so, the Justiciar or Sheriff shall restore him to the possession (*faciet ei resaisinam*) of the land from which he was dispossessed, and the dispossessor shall be in the King's amercement (in *Regis misericordia*). But if it shall be found that the complainant has made unjust complaint, the complainant shall himself be in the King's amercement to the amount of 10*l.*'

It is impossible to read into this Statute the notion that the complainant who alleged that he had been '*vestitus et saisitus*' was required to prove a formal investiture in his favour according to feudal rules; and, but for the rules of Scotch law which are found existing at a later period, no one would have imagined such a construction possible. It is clear that the Statute, by the words '*saisitus*' and '*dissaisitus*,' means 'possessed' and 'dispossessed' and nothing more. 'Seized' is indeed, in its primary sense, nothing more than 'possessed;' but by association with the feudal investiture, the essence of which is possession taken in a formal manner, the words 'seized,' '*saisine*' or '*seizin*,' have acquired a secondary and special meaning. This construction of the Statute is supported

by the authority of Mr. Hill Burton, than whom none had better opportunities—or better used them—of forming a just estimate of the effect of a law of this period. After referring to the burgh customs (common to England and Scotland) by which a bondman residing a year and a day within the burgh became free, and to a rule—probably an ancient one—which allowed liberty to one who had for seven years been settled peaceably on any person's land, and then stating the substance of this Statute, he remarks<sup>1</sup>:—‘In later times, an inquest or jury sitting on such a question would look to written titles. In Alexander's time, unless in important cases of feudal investiture and performance of homage, there would be nothing to establish the peasant's holding, save the testimony of neighbours that the family of the ejected peasant had as far as was known been possessed of the holding, or, perhaps, the recollection to that effect of the true men themselves. We may here see one out of apparently a number of shapes in which the thrall, bondsman or serf, not being one of a caste condemned to slavery, might by degrees found a heritage of freedom for his race. Through the favour of accidents which have relieved him from strict vigilance, he has lived seven years on the estate of a man who has perhaps found him useful. He and his family there abide for a generation or two; and then if the lord of the soil desire to eject his descendant, it is found that the family have an established right to their holding.’

There was another way, at this early period, in which the conditions of the law in Scotland were more favourable than in England to the emancipation of the servile classes. The two powerful factors to this result were the Burghs and the Church; and in Scotland the power of the Church in this direction were not restrained as in England by the movement of which the Constitutions of Clarendon (1164) were the outcome. By a clause of these celebrated Constitutions it was enacted ‘that the sons of villeins should not be ordained clerks without the consent of their lords,’ and it is significant that Glanvill, in treating of the ways in which villeins may acquire freedom, makes no mention of the effect of ordination. In the parallel chapter of the Scotch book of the law known as *Regiam Majestatem* (to be hereafter described), there is a section headed ‘*De servis non ordinandis* ;’ where it is assumed that the bondman when ordained would be *ipso facto* free; but the question is discussed whether a bondman ordained without the knowledge or consent of his lord could be brought back into bondage. The conclusion arrived at shows a compromise, but one more in favour of the Church's claims than the sentence of the English Constitutions. If the bondman has been promoted to one of the

<sup>1</sup> Burton, *Hist. of Scotland*, vol. ii. p. 153.



minor orders (as a clerk) both without the knowledge of his lord and without either the person who presented him for orders or the person who ordained him being aware of his true *status*, he could be called back into bondage and given up to his lord. 'But' (as the later vernacular translation runs) 'gif he be made a priest, he shall serve his master in God's service, rather than anie other man.' So if he is made a monk, he shall be free. If he is ordained to any order with the knowledge of the person presenting or ordaining him, he is to be free ever after, but the person so acting in privy of his *status* is to give the lord another bondman.

One more law of the reign of Alexander II. may be here referred to as bearing on the lowest condition of persons. The law is entitled '*De modo duelli secundum condiciones personarum*;' and the privileges of persons of various conditions in regard to the important right of appeal by combat are enumerated. Knights and holders of free tenements are entitled on certain conditions to fight by deputy. Bondmen, and those who cannot claim the rights of freemen either by reason of tenement or descent, are equally entitled to the appeal of battle, provided they fight in their own proper persons, or else that their lord takes up the quarrel.

It is difficult to resist the impression that, in the twelfth and thirteenth centuries, not only were the modes of escape from the servile condition more easy in Scotland than in England, but that the condition itself left more freedom of action to the bondman. Certainly there is no trace in Scotland of the condition of the peasant bound generally 'to do as he is bid;' a condition described as frequent by Bracton and mentioned even by Coke as not quite obsolete. There was nothing, at this period, or at any early period of Scotch law, analogous to the harsh forest laws which figure so largely in early English statutes. Nor until the time of Edward I. did there exist in Scotland a castle of the Norman type. It seems reasonable to believe that to the strong and popular government under David I. and the Alexanders was owing the existence in Scotland of an independent burgher class and free peasantry, such as bore the brunt of the War of Independence, and through the succeeding century maintained successfully an incessant struggle for national existence.

Up to this point the differences which can be assigned to the laws of Scotland and England are of the same class with the differences which might be shown to exist between the administration and usages in various parts of England at the same period. The point is now reached of divergence between the laws of England and Scotland as two distinct systems of law. The direction and extent of this divergence in regard to the land laws will form the subject of another essay.

R. CAMPBELL.

## THE TEXT OF BRACTON.

THE *Law Magazine and Review* for August 1872 contained, under the heading 'A Plea for a New Print of Bracton,' an article by Mr. H. S. Milman, which animadverted strongly on the fact that there was no reliable text of the chief medieval treatise on English law. Since then Sir Travers Twiss' edition has appeared, in six bulky volumes of the Rolls Series, and still there is every reason to plead for a revision of Bracton's text. Warnings were not wanting while the new edition was in progress—the *Saturday Review*, for instance, entered more than one protest against the management of the work, and exposed many blunders. These warnings were disregarded, however, and the result has been the production of something rarely equalled in the history of learning.

It is not necessary even to look into the MSS. in order to see that Sir Travers Twiss' work has been done in an utterly careless way. Even a casual reader will ask, with wonder, why the extract from the Tower Roll, 18 Henry III, has been printed twice, as an appendix to the second and to the sixth volume. One need not be a great sceptic to doubt the reasonableness of giving the long passage—'ut si quis donationem fecerit . . . si autem maior, tunc relevium,' first on pp. 260, 262, and then on p. 270, of the first volume. There are differences to be found in both cases, but only in the editor's translation<sup>1</sup>, where, for the sake of variety, the 'first-born' and 'after-born' of p. 261 get changed on p. 271 into 'earlier born' and 'later born.' Of course Tottell made the mistake 300 years ago, but he did not translate, at least; and as for the MSS., they give the passage either in one place or in the other, and not in both.

It is amusing to see how Sir Travers Twiss gravely follows Tottell in the latter's most obvious mistakes, although the necessity of providing for a translation ought to have taught him better. On f. 191 of the book of 1569 we find, for instance, the following:—

'Item videtur quod non poterit quis terras vel catalla a seruo vel fugituo qui fuerit extra potestatem et in statu libero auferre sine corpore, propter verba in breui de natiuis contenta, ubi praecepit dominus Rex quod vicecomes faciat ei habere natium et fugitium suum, cum tota sequela sua, et cum suis catallis, et unde videtur quod sine iuditio catalla sua auferre non potest, quia si ita, talia

<sup>1</sup> Except that between the two places, p. 262, the person employed to copy out Tottell's text has become tired of writing out the contractions, which accordingly disfigure the rest of the reprint.

verba scilicet (cum catallis) in breui *perperam, propter personam*, posita effectum non haberent.'

The words 'propter personam' do not make sense, are not justified by the MSS., and may have got in as a consequence of mistaken attempts to extend the contraction 'ppam.' Sir Travers Twiss not only prints them, but actually translates them by 'in the writ, near (!) the person.' I think that a careful student of the new editor's translation would get quite new lights about the meaning of Latin words in general and prepositions in particular. A passage in vol. i. p. 173 would have shown him that *pro* must mean 'by' and not 'for' or 'instead,' and this rule would impress itself upon him as a very stringent one, because the translation 'by a deed' effectually gets rid of the sense of an entire sentence<sup>1</sup>.

Once on his guard, an attentive reader may often guess at true readings through the film of the perverted text set before him. He will not believe that the first words of Book IV. ch. 21 are 'Si vero nihil scit, quod excipi potest' (translation—'but if he *knows* nothing'), and will find out 'Si vero nihil sit' for himself. A few lines lower down he may alter the absurd '*cum*' into '*tamen*.' Neither is it impossible to guess that 'Si autem totum non habuerit *statum*, transfert id quod habet' (f. 40. c) ought to be amended by changing '*statum*' into '*statim*': at any rate, no reader even a little conversant with classical or medieval Latin will believe the translator who renders '*statum*' by 'estate.' But, after all, editions in six volumes are not made with the view of sharpening the critical faculty of law and history students, and all casual corrections by guess-work must certainly produce in the end a complete distrust of the received text.

This feeling can only be heightened if the student takes even a chance view of the MSS. What trust is to be put in an editor who describes MS. Tanner 189, at the Bodleian, in the following words: 'This MS., which is catalogued as a Bracton and for that reason has been here mentioned, is in fact a portion of the Law treatise in the Anglo-Norman tongue known as Britton and Bretoun, which was composed in the reign of Edward I'? Now there is not a single word of Anglo-Norman nor a line of Britton in the MS., which is a plain Bracton in Latin, with some omissions and transpositions. If a hopeless muddle is made of the plainest things, there is no chance of getting over difficulties by the help of such an edition. The '*coraagia et carvagia*' of f. 37, translated

<sup>1</sup> The point is that a gift in frank marriage ('free marriage' in the dialect used or sanctioned by Sir Travers Twiss) may bind the donor to warranty without a deed or homage: 'quia femina per donatorem sic maritata, vel eius pueri vel heredes, si ipsa obierit, erunt pro charta et sufficiunt pro charta:' translated, 'will be [maritaged] (*sic*) by a deed, and are sufficiently [so] by a deed.'

'coraages, carvages,' and explained in the index as 'common contributions,' may well astonish any student of medieval customs. Many MSS. have got here corrupt readings, but some of the better give the necessary clues. Rawl. C. 159, and Digby 222, for instance, read *cornagia*<sup>1</sup> as the first word; Rawl. C. 160 gives *carucagia*<sup>2</sup> as the second. Sir Travers Twiss actually puts in a foot-note to say (vol. i. p. 290): "'coruagia," "et" being omitted in MS. Rawl.' No better example could be given of his peculiar knack in hitting upon absurdities and overlooking matters of any importance.

Nothing else could be expected, after all, from a reprint of the book of 1569, which was pronounced full of gross errors by Selden some 240 years ago<sup>3</sup>. The few notices of varieties of reading are quite insufficient to resettle the text, and seem inserted very much at random. Sometimes a trifling difference of spelling is followed out through four or five MSS.; in other cases most important discrepancies are left without any comment. No attempt has been made to establish anything like a pedigree of MSS., although it is very easy to perceive that they group themselves into classes which stand in definite relations to each other. Yet nothing could be done in the way of printing a critical text of Bracton without this preparatory work. The number of existing and known MSS. is so large, the constitution of their text so very different, that it was a matter of obvious duty for the editor to make a selection on the basis of a careful classification. Sir Travers Twiss did nothing in this way, beyond noticing whether a MS. was provided with a table of contents or not, in how many books and chapters the text was divided, and what was the wording of a passage about the tree of consanguinity. This cannot be called even an attempt at rational classification. The result has been that the MS. specially pointed out as best, Rawlinson C. 160, seems quite unfit to give a standard text. I shall have occasion to notice hereafter some of its particular readings; I will now point out the reasons which lead me to assign it a very secondary position. It is much too complete; it gives many passages which are left out by the MSS. of older writing and look decidedly like later insertions. In the very description of the tree of consanguinity, which Sir Travers Twiss has taken for the criterion of merits, Rawl. C. 160 has several columns of additional matter on ff. 36, 37, and 38, and stands quite alone in this respect.

<sup>1</sup> Nichols in the *Archæologia*, xxxii, 2 section.

<sup>2</sup> Cf., for instance, Stubbs, *Constitutional History*, i. 510.

<sup>3</sup> *Dissertatio ad Fletam*, p. 464: 'Menda sunt perplurima eaque crassissima, partim e librorum inicitia, partim ex operarum incuria.' Sir T. Twiss has contrived to add to both classes.

This fact, along with the coloured drawing of a tree on f. 37 b, allures the new editor into giving Rawl. C. 160 the palm among Bracton MSS.<sup>1</sup> But is it at all likely that only one copy, and a late one, should have kept the original text intact, while all the rest, though constantly at variance between each other in other matters, should have all gone wrong in the same way in omitting a whole section of the treatise? I presume that even Sir Travers Twiss himself was not quite confident as to the soundness of his verdict on this occasion; or why did he not restore the true text in a footnote, or rather in an appendix? Surely the discovery of a hitherto unknown genuine passage of Bracton, which would fill some ten to fifteen pages of print, was a matter of no slight interest and importance. Of course the aspect of things changes greatly if the whole paragraph has been put in from some other work, as an illustration to Bracton's text, by the lawyer for whom or by whom Rawl. C. 160 was written.

In fact, a look at the additional pages of Rawl. C. 160 is sufficient to show how wisely Sir Travers Twiss has done in withholding from his readers a knowledge of the text 'which is on the subject of the degrees of consanguinity, and was probably a copy of the treatise, as originally drawn up by Bracton' (Intro. p. xxi). To begin with, the drawing on the existence of which such stress is laid represents a tree not of consanguinity, but of affinity, a quite different thing, as the learned editor must have known. The arbor consanguinitatis is described too, but higher up and with no drawing at all, to illustrate the description. What has the subject of affinity to do with Bracton's chapter treating of the order and degree of succession? Nothing, of course; but it has much to do with the canon law of marriage, and, in truth, the whole insertion is clearly a fragment from some decretalist's treatise, '*de consanguinitate et affinitate*.' In substance it is very much like the celebrated disquisition of Johannes Andreæ upon the subject<sup>2</sup>, but more diffuse and probably anterior, as it stands in Rawl. C. 160, written in the beginning of the fourteenth century. Rhymed rules are quoted, which may have been taken from the versified treatise of Johannes de Deo<sup>3</sup>. Besides these indications, which would place the work somewhere in the second half of the thirteenth century, there are many more which, though partly obscured by the bad transcription of Rawl. C. 160, might lead an experienced canonist to determine exactly from what literary production of the thirteenth century these pages have been taken. But an extensive knowledge of

<sup>1</sup> Vol. i. Intro., pp. xxii, xxiii.

<sup>2</sup> *Corpus juris canonici*, ii. 1231 sqq.

<sup>3</sup> Cf. Schulte, *Quellen des Canonischen Rechts*, ii. 100.

canon law is not required to see that the whole does not fit into Bracton's book at all and presents a totally different treatment<sup>1</sup>.

Bracton refers in some few instances to the *Decretum Gratiani* and the *Decretals* (cf. Güterbock, 38), but even his way of giving his references is different from that followed in the insertions. Take f. 63 for example: 'Et ad hoc facit decretale cujus verba hæc sunt inter virum et mulierem;' the schooled canonist of the insertion always quotes the 'extra.' So much for Sir Travers Twiss' great argument in favour of the special authority of *Rawl. C.* 160. The labour of settling the relation between the MSS. and selecting the necessary foundation for a text cannot be undertaken lightly, and must be left to the scholar who may try his hand at a real edition of Bracton. Still I believe that even a limited acquaintance with the MSS. will enable me to point out one of the greatest difficulties which surround the student of Bracton at present, as well as how such difficulties are to be avoided. Even if we take our knowledge from Sir Travers Twiss' prefaces and notes, we cannot help recognizing the fact that there are some passages in the text—as printed in 1569 and lately—which were not drawn up by Bracton himself, but were inserted at a later period by those who used the treatise. Such is the reference to the case decided by John of Mettingham which stands in some copies, though this Judge acted in Edward the First's reign. This is a most glaring instance, but in two or three other cases the last editor supposes<sup>2</sup> a similar interpolation, and his notes point out not unfrequently that a particular passage is omitted by some of the MSS. The reader may well ask himself whether the shorter redaction does not represent an older state of the text, enlarged and developed subsequently by additions and glosses. Any such supposition cannot ripen into conviction on the ground of the casual

<sup>1</sup> I will just print the beginning to satisfy the reader about the character of the insertion. It must be remembered that one leaf has been cut out and the text begins abruptly:—

'ut ex de consanguinitate et affinitate non debet (meaning the Decret. Gregor. IX. lib. iv. tit. 14. chap. 8), et ut ibidem scribitur quaternarius numerus bene competit prohibitioni conjugii corporalis de quo dicit apostolus 1<sup>o</sup> ad Corinth. vii. a. quod vir non habet potestatem sui corporis sed mulier, nec mulier habet potestatem sui corporis sed vir quia iiii<sup>or</sup> sunt humores in corpore quod et constat ex iiii<sup>or</sup> elementis. Ad horum autem graduum computationem diffinitionem cognoscendam apponitur non solum doctrina docentis, sed et pictura arboris. Hii enim duo sensus scilicet auditus et visus sunt sensus disciplinales, ut inter omnes sensus primatum tenet visus, quia agit luce pura, sed quia de arbore non intendimus nisi consanguinitatis causa. Ideo antequam arborem protrahamus, videamus quid sit consanguinitas et quot sint linee, quid sit gradus et qualiter gradus computentur, et usque (corr. usque) ad quem gradum perhibeatur matrimonium. Consanguinitas est habitudo persone ad personam carnali tantum propagatione contracta, vel s'c, consanguinitas est vinculum personarum ab eodem stipite descendencium carnali propagatione contractum, et hec omnes diffinitiones in idem redeunt, vel sic. Consanguinitas est naturale vinculum personarum ab eodem stipite descendencium carnali propagatione contractum.'

<sup>2</sup> For instance, i. pp. xviii, 272.

remarks in Sir Travers Twiss' notes, whereas it will certainly do so after the inspection of some of the very MSS. used for the new edition.

In the course of a study of the history of the Manor in England I found some passages in Bracton to be so strange in their wording, and to agree so little with other parts of the text and independent facts, that I resolved to verify their reading as much as it was in my power to do. For this purpose I went through the MSS. in the British Museum and the Bodleian Library, compared the Longleat copy, which the owner, the Marquis of Bath, had the kindness to send over to Oxford for my use, and made inquiries about some readings of the Cambridge and Paris MSS. As to the particular question just started by me, my survey led to very interesting results. The older MSS. and a few of the later pointed out a number of more or less important passages as insertions, glosses, notes, even in their external aspect, and, what is more, they agreed with one another in most of these cases. Some of the passages which appear in the printed books were simply omitted by all the better MSS.; very often the insertions are marked by an 'addi—cio,' which puts the interpolation as it were into brackets. A very great number of the pages of Rawl. C. 159 and Add. 11,353 are supplemented by such signs. The Longleat Codex (fourteenth century) has been written by a very indifferent scribe from an original similarly constituted, and sometimes the 'addicio' is found in the text itself against sense. The MS. Royal, 9 E. xv, at the British Museum, often writes 'plus' on the margin, and sometimes even goes the length of explaining that it swerves from a shorter original: 'in hoc libro plus continetur quam in alio,' or words to the same effect. But the best view of the gradual development of the text is presented by Digby 222, at the Bodleian (beginning of fourteenth century). The copy was evidently written in a hurry by different scribes, who divided the quires of the original and began transcribing simultaneously. The portions written by the first hand are constantly supplemented by large notes on the margin and at the foot of the pages which coincide with omissions and additions of other MSS., whereas the second hand sometimes simply leaves out the excrescent parts. The text runs quite smoothly without these, and they are mostly recognisable not only from their external position, but also from their character, being either recapitulations, explanations, supplementary remarks, or even statements which do not agree with the main body of the treatise. When these glosses get into the text, as has been the case in most copies, they produce considerable confusion; passages meant to form a whole are rent asunder, and sometimes the note wanders

about the text not finding exactly the place where to fit itself in. Now, such a state of the MSS. must at once raise the question, whether we are entitled to treat all the different elements of the received text—original stock, marginal glosses, passages omitted in earlier MSS. and inserted by later—as of equal value and common origin. Of course, there is the strongest critical presumption against passages of this last class, which embraces not a few of the standard Bracton quotations. But even the matter marked as additional will surely require careful examination and sifting. What notes are entitled to go back to Bracton's original and must be taken as the author's own additions, what other glosses represent the development of his school, and what ought to be considered as critical remarks? It is not easy to solve such questions, but inquiry in that direction, based on an adequate classification and study of MSS., would be by no means hopeless.

There is the external criterion of omissions in MSS. containing a text evidently meant to be full, a criterion which will prove most stringent as soon as the copies are got into order of age and descent: the later crusts must peel off by a mechanical process, as it were. There is the criterion of internal evidence: it cannot be applied so often as the first one, and may present sometimes a greater scope for misgivings and differences of opinion, but, on the other hand, it gives most interesting clues as to the development of legal notions and schools. Of course any systematic work in both directions must be left to the future editor of Bracton, but I should like to supplement and illustrate my general remarks by discussing one or two passages which, as I take it, can be brought out as interpolations with the help even of the scanty means at our disposal. I shall take my illustrations from the first two books, which I have been particularly studying, but the same remarks would apply with some differences in degree to other parts of the work.

1. Fol. 3, a. 'Supponitur etiam jus quandoque pro actione, quandoque pro obligatione qualibet, quandoque pro haereditate, sicut pro proprietate rei, quandoque pro bonorum possessione, quia est jus proprietatis, et jus possessionis. Item jus possessionis, sicut feodum; unde locum habet assisa mortis antecessoris. Item jus possessionis, sicut liberum tenementum, si quis tenuerit tantum ad vitam quacumque ratione. Item jus proprietatis, quod dicitur jus merum, et unde poterit quis habere utrumque. Et dividi poterit quandoque jus proprietatis a jure possessionis, quia proprietas statim post mortem antecessoris descendit haeredi propinquiiori, minori et majori, masculo et foeminae, furioso et stulto, sicut fatuo, surdo et muto, praesenti et absenti, et ignoranti sicut scienti. Sed tamen non statim acquiritur talibus possessio; licet possessio et jus possessionis semper sequi debeat proprietatem. Jus autem posses-



sionis descendere poterit per se ad alias personas, et per alios gradus, ut si, cum jus proprietatis descendit ad agnatum propinquiorem, *primo natus* frater ponat se in seysinam, et sic moriatur seysitus, transvertit ad haeredes suos quoddam jus proprietatis cum jure possessionis, quod sequi debet proprietatem primam, et sic de haerede in haerodem; sed primi haeredes majus jus habent quam secundi haeredes, sed semper praeferruntur debet possessio, donec primi haeredes verificaverint jus suum; si tamen frater postnatus plures habuerit filios [filias ed. 1569], et *primo natus* se ponat in seysinam, ita fieri debet de eo ut supra, et sic poterit ad plures diversos haeredes descendere jus proprietatis in infinitum, ut cum plures jus habeant proprietatis, unus vel plures possunt habere jus majus. Item ponitur jus quandoque pro potestate, ut cum dicitur, "iste est sui juris," quandoque pro rigore juris, ut cum dividitur inter jus et aequitatem.

I take this passage for discussion because it presents the first gloss inserted into Bracton's text. Sir Travers Twiss notices here the omission in some MSS. of the words from 'quia est jus proprietatis' to 'quandoque in possessione.' This last indication must be taken to mean that the omitted passage runs till 'quandoque pro potestate.' The editor then states that his text agrees with MS. Rawl. Here again 'disagrees' would be more to the purpose. The whole disquisition about the right of ownership quite loses its sense, because the new edition agrees not with any MSS. but with ed. 1569, and prints *primo natus* in two instances, where all the MSS. I have seen have *postnatus*. The insertion deals with a case when the right of ownership has swerved from its due course, the younger brother has put himself into the succession instead of his elder, and in consequence possession gets estranged from ownership. The blunder '*primo natus*' makes it quite impossible to get at the meaning of the quoted lines, and, as I say, all the MSS. I have seen, Rawl. 159 and 160, as well as others, read 'post natus.'

The whole thing is of course a marginal gloss, which has been omitted by some of the better copies, left on the margin by Digby 222, and shoved itself in between two connected parts of the same sentence in most. In Royal 9 E. xv. and the Longleat MS. the gloss has changed its place and stands at the end of the chapter. Rawl. C. 159 has clear traces of 'addicio' on the margin: the *cio* is plainly written opposite the end of the sentence, and *addi-* has been changed by some one who did not understand its meaning into 'aliud.' It would be impossible to say with certainty that the interpolation is a later one and does not go back to Bracton's time, but the probability lies this way, for two reasons: the subject matter is a very lame and misplaced illustration of a difference which belongs to another connection altogether; such first-rate MSS. as Add. 11,353 and Galeazzo omit the passage entirely.

2. Fol. 6, a. 'In potestate aliena sunt servi, quae quidem potestas dominorum in servos a jure gentium est, quae aliquando fuit et vitae et necis servorum, sed nunc coarctata est per jus civile, ita quod vita et membra sunt in potestate regis, ita quod si quis servum suum occiderit, non minus punietur quam si alienum occiderit, et in hoc legem habent contra dominos, quod stare possunt in iudicio contra eos de vita et membris propter saevitiam dominorum, vel propter intollerabilem injuriam, ut si eos destruant, quod salvum non possit eis esse waynagium suum. Hoc autem verum est de illis servis qui tenent de antiquo dominico coronae, sed de aliis secus est, quia quandocunque placuerit domino, auferre poterit a villano suo waynagium suum et omnia bona sua. Expedit enim rei publicae ne quis re sua male utatur.'

In this case we can speak with more confidence, and the matter in itself is of far greater importance. The quoted text follows rather closely the wording of Azo, *Instit.* I. p. 1077, who in his turn is stating the doctrine of slavery, mitigated by humanity, as settled in the later Roman law by the emperors, especially Hadrian and the Antonines. The definition of *intollerabilis injuria* is, however, quite peculiar to Bracton, and evidently based on English practice. For Azo and the Romans the '*intollerabilis injuria*' is equivalent to *infamia corporis*; there is no trace of any protection afforded to the slave's possessory claims, and the only cases in which the law stepped in between the slave and his master concern the person of the slave, which is recognised as a human personality. Bracton goes further, explains '*intollerabilis injuria*' to mean the taking away of the waynage, and admits a right of the villain, nicknamed 'slave' after the Roman fashion, to sue against his master on possessory grounds. After swerving deliberately and in such an important matter from Azo's text, the English lawyer adds a material qualification, by the sentence '*hoc autem verum est . . . bona sua.*' Further inspection shows, however, that this last sentence is simply heterogeneous to Bracton's text, and that we have in truth to deal with a marginal gloss. It breaks up the continuity of the reasoning and severs the statement from its motive: the master is restricted by the State in his power over the slave—because the State is interested that nobody should misuse his power over things. It is not only a gloss, but a gloss in opposition to the text, and is not so much a qualification as a direct contradiction. The text speaks of serfs quite generally, the insertion restricts the statement to a comparatively very small class of persons, who in Bracton's terminology and classification are not *servi* at all (f. 5 a, cf. 7 b). It does not fit even that small class, because the socmen in ancient demeane, of whatever condition they may have been, were civilly protected, not only in

their waynage, but also in their holdings and even as to the amount of their dues and duties. A look at the MSS. will lead us out of this confusion. All the older and better amongst them, and even some of the later, *Rawl. C.* 160 *not excepted*, have got no trace of the inserted passage<sup>1</sup>, not even as a gloss. This fact has been thought beneath notice by the editor, but it is a fact, and leads to very evident conclusions: Bracton's text ran without any qualification, and the restriction we find in the printed books is a very awkward attempt of later lawyers to reconcile Bracton's assertion with the practice of their time. The attempt must have been made rather late in the day, and perhaps in consequence of the treatment the matter had received in Fleta and Britton. However that may be, the main fact, namely, that Bracton spoke of the right of serfs, that is, villains, to sue against their lord for their waynage, seems established on internal and external grounds.

This fact suggests important considerations. On other occasions Bracton does not mention the right, and it is well known that the Law Courts of the thirteenth century did not admit it as a rule. Still our passage is by no means an isolated one, and provides us with another and most important link in a chain of evidence, which tends to show that the civil incapacity of the villain as to his lord only gradually developed itself out of a state of things in which his position as a bearer of civil rights was recognised. So late as in the beginning of the fourteenth century the *Mirror of Justice* (quoted by Nichols, *Britton*, I, 197) speaks of the villain as a free man and argues from the Charter that the lord has no right to take away his waynage. The conception is an erroneous one, of course, the great Charter putting a limitation only on the amercement of villains by the king, but the idea must have been very prevalent and have coincided with the popular view of the position of villains as to their lords. On the other hand the *Leges Willelmi*—which may be taken as a sample of the legal principles commonly accepted at the close of the eleventh and the beginning of the twelfth century—treat the relations between lord and villain as regulated and protected by the State (c. 29<sup>2</sup>), a view of them which is quite consistent with the fact that the villains of Norman time have sprung from the free ceorle of Saxon history. In this connection our restitution of Bracton's text gains additional interest and importance. Bracton's sentence appears as a theoretical survival

<sup>1</sup> Add. 11,353, Roy. 9 E. xv, *Rawl. C.* 159, *Rawl. C.* 160; Digby, 222; Bodley, 170; Longleat, Galeazzo (Paris, Bibl. Nat. 4674). For the reading of this last most important MS. I am indebted to my friend the Editor of this Review.

<sup>2</sup> Labourers (oil qui custivent la terre), paying their dues and performing their services, are not to be disturbed in their holdings. The Latin version calls them 'coloni et terrarum exercitores.'

of the older state of the law giving way before the encroachments of feudal lords, the generalisations of Romanistic lawyers and the difficulty of the King's Courts enforcing actual and general protection in such case

3. Fol. 34. 'Item nec factum regis, nec chartam potest quis judicare, ita quod factum domini regis irritetur. Sed dicere poterit quis, quod rex justitiam fecerit, et bene, et si hoc, eadem ratione quod male, et ita imponere ei quod injuriam emendet, ne incidat rex et justiciarii in judicium viventis Dei propter injuriam. Rex autem habet superiorem Deum scilicet. Item legem, per quam factus est rex. Item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium, habet magistrum, et ideo si rex fuerit sine fraeno, i.e. sine lege, debent ei fraenum ponere, nisi ipsimet fuerint cum rege sine fraeno, et tunc clamabunt subditi et dicent, Domine Ihesu Christe, in chamo et fraeno maxillas eorum constringe; ad quos Dominus, Vocabo super eos gentem robustam et longinquam et ignotam, cujus linguam ignorabunt, quae destruet eos, et evellet radices eorum de terra, et a talibus judicabuntur, quia subditos noluerunt juste judicare; et in fine, ligatis manibus et pedibus eorum, mittet eos in caminum ignis, et tenebras exteriores, ubi erit fletus et stridor dentium.'

These interesting sentences, which breathe the spirit of the Provisions of Oxford, are omitted by Roy. 9 E. 15, Add. 11,353, Digby 222, while Rawl. C. 159 introduces them only as an addition. Thus external evidence speaks against admitting that the passage in question belonged to Bracton's original. And here again the testimony of the older MSS. coincides with considerations drawn from the meaning. The lines quoted above have been written apparently to match fol. 5b-6a. The same expressions are used in both instances, but the theories examined are at variance with each other. In the first book the author, undoubtedly Bracton, acknowledges no human superior to the king. Only God and the law are above him, and if he breaks the law, nobody can correct him but God. In the interpolated sentences of fol. 34 the king's peers are recognised as his superiors when they act as the body of his court, and it belongs to them to watch over the king's doings and shape them according to the law. In fact the two passages seem to represent two doctrines current at the time of Henry III, one which countenanced more or less the king's arbitrary acts, the other in keeping with the celebrated Latin poem in honour of Simon de Montfort and the acts of the baronial body. It is difficult to believe that the same man should have written in both senses in the same work, and the fact that in the second instance we have an interpolation shows us which was Bracton's personal inclination.

I think these examples are sufficient to show that even an

incomplete comparison of MSS. would raise many questions of general interest, and to hint at solutions which disagree materially with the received notions about Bracton's text. Let us hope that the failure of the Rolls edition will not deter English scholars from the arduous task of preparing another one more worthy of the great thirteenth-century lawyer. When Pertz, jun., spoilt the volume of Merovingian charters in the *Monumenta Germaniae*, the fact proved only an incitement to the new directors of that great undertaking to start the work afresh. Any similar attempt as to Bracton would be the more promising, in that it could follow the lines of a standard edition of a medieval law-book — Nichols' edition of Britton.

PAUL VINOGRADOFF.

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## JURISPRUDENCE; ITS USE AND ITS PLACE IN LEGAL EDUCATION.

FOR the purposes of the present article, Jurisprudence may be defined as the Science of Positive Law. These words indicate its province and its method; which must, however, be somewhat more fully explained before we can state its use or its place in legal education. By the word Positive is here understood nothing more than actually existing or having actually existed: a sense of the word which appears to be fairly established not only in other cases, but particularly in that of law. With Austin, Positive includes the idea of some sort of enactment; but it is at least questionable whether there are not instances of actual working law, recognised as such by the majority of civilised people, without the necessary admission of any such idea. Great part of what is usually and reasonably termed Constitutional Law falls within this category, whether we allow the so-called International Law to bear that name or substitute Austin's phrase of International Morality.

The most important result of confining Jurisprudence to Positive or actual law is to exclude from its province all rules not gathered from observation but deduced *a priori* from assumed first principles. Here we therefore take leave of the time-honoured Law of Nature, so far as it represents the mere speculation of philosophers. The limitation contained in these last words appears necessary. Current morality, that is, a generally prevalent approval of some actions and disapproval of others, may also be referred to Nature; but this subject stands, for us, on a very different footing from the shadowy Law of Nature which we have just discarded. Jurists may bring themselves to hold, as Austin seems to have held, that law is nothing but a system of commands, obeyed, at least in the first instance, from fear of the evil conditioned on disobedience; and that even the distinction of Right and Wrong is a question of conformity or non-conformity to an imposed rule. But it may be confidently stated that this is not the view of the majority of mankind; whose views and whose motives for obedience to law must surely be admitted as factors in the practical existence of law itself. The recognition, therefore, of some current distinction between Right and Wrong, as an antecedent fact bearing upon law, is a different thing from the building up of a system upon original axioms of human nature. Positive law, in the strictest sense, while it may

and should be distinguished, cannot be entirely separated, from Positive morality.

Another apparent enlargement of the proper province of Jurisprudence may easily be seen to be in truth part of that province itself. Except in the earliest and rudest systems, certain modifying conditions, mental or physical, of a *prima facie* offender against law, are universally taken into account. Hence any treatment of modern law, practical or scientific, which contemplates the possibility of offenders and the mode of dealing with them, must necessarily involve some limited reference to mental philosophy or psychology. There is indeed no part of Jurisprudence more fundamental or essential than this.

It has also been held to follow, from the definition of the province of Jurisprudence here adopted, that our subject has nothing to do with the goodness or badness of law, with ideals or even with reasonable projects of reform. A consideration of these matters finds its place, we are told, in 'Principles of Legislation;' not in Jurisprudence, which deals with law as it is or has been rather than with law as it ought to be.

The distinction is, at any rate, an extremely important one. Most of the older works on law in general, and many of the modern ones, are rendered next to useless by the indiscriminate admission, on an equal footing, of principles sanctioned by practice and principles only suggested in theory. And yet a hard and fast line, drawn between the principles of law and those of legislation, cannot be considered very satisfactory. It is easy to see that such an important work as the 'Traité' of Bentham belongs mainly to the latter, and the excluded one, of these subjects. Austin himself admits the frequent combination of the two, under the single title of Jurisprudence. And later authors not unreasonably represent the improvement of law to be half the *raison d'être* of its science.

The determination of the province of Jurisprudence in this quarter appears to depend upon the particular object with which the study is pursued. By statesmen, Jurisprudence will mainly be looked at as a means to good legislation: for the student, its primary end is the attainment of clear ideas on law as a matter of historical fact. Towards this end, a consideration of the objects proposed by law, and its suitability for attaining those objects, will no doubt be from time to time necessary: but if the chief place be given to such consideration, it is apt to lead the mind of a learner into that fatal confusion between the actual and the desired, to which reference has already been made.

Enough, however, has been said of the province of Jurisprudence: it remains to add a few words as to the method which is indicated

by the word Science employed in our definition. When we speak of Jurisprudence as a science, we are not, of course, to forget that positive law is, after all, a matter of human practice and expedients. That universal and necessary character which is claimed for the conclusions of some other sciences cannot be here expected. The main object, in fact, of calling Jurisprudence a science, is to distinguish it from the Art which relates to the same subject-matter. As a science, then, Jurisprudence deals rather with the general principles notions and distinctions of law than with their application to individual cases or their embodiment in detailed rules. It will scarcely be denied that a certain amount of such principles notions and distinctions can be obtained, by generalisation and abstraction, from the rules and cases of any particular body or system of law. In this case, the results are styled Particular Jurisprudence, which is the only strict or correct use of that phrase. It is, however, generally and not unreasonably assumed that there are certain principles notions and distinctions common to *all* systems of law, at least among nations which have attained any appreciable degree of refinement or civilisation. These are the objects which it is the special aim of Jurisprudence, as here understood, to set forth ; and they are undoubtedly best ascertained by a comparison of different systems. Hence it has been, with much justice, maintained, that all Jurisprudence is practically general or comparative, and that the distinction of Jurisprudence into general and particular is of little use, if not actually misleading, on account of the ambiguity with which the latter term has been employed.

A step further has been taken by some writers, who endeavour to make out that the common principles obtained by the above method are in fact *necessary*, as resulting from the universal nature of man. Such an endeavour goes considerably beyond that recognition of some general distinction drawn between Right and Wrong which, as it has been shown, may fairly enter into the view of Positive Law. The inferences or deductions made by these writers would appear to claim a universality which those of Jurisprudence (in our present sense) do not and cannot claim. But, at the same time, they pass, from the region of a *posteriori* reasoning upon experience, to that of a *priori* speculation.

With regard to its utility, the study of Jurisprudence would appear to be an indispensable preparative for the work of legislation or legal reform. Neither clearness, nor comprehensiveness, nor consistency with their existing law, can ever be attained by legislators ignorant of the general principles notions and distinctions of that law itself. And, beyond these, the wider generalisations arrived at by a comparison of different systems are of a double service to



the national legislator or reformer. On the one hand, they supplement and elucidate the Particular Jurisprudence (to use that term in its strict sense) of his own country: on the other hand, they mark out so much of legal principles notions and distinctions as has been preserved by a general consent, and is therefore likely to have substantial utility for its basis.

The uses of Jurisprudence to the private student and intending practitioner are, as will be gathered from what was said about its province, somewhat different from its uses to the statesman. If the student be engaged upon a body of law which is capable of scientific exposition, it has been forcibly urged that the abstract system might as well be acquired together with, and through the medium of, the concrete application. Such a capacity, however, is certainly not as yet possessed by the law of many nations; and is not conspicuously the virtue of our own. Even after considerable improvement in this respect, it would still seem desirable, if possible, to establish in the mind of the learner a few leading ideas, and some general system or outline, before he commences what will otherwise be a very bewildering and discouraging study.

For this purpose, it may still be questioned whether a better scheme can be suggested than that of Austin's Lectures. First, of course, must come the by no means easy task of defining what is meant by that Positive Law which constitutes the Province of Jurisprudence. With this definition must be coupled some analysis of the fundamental ideas indicated by the words Right, Duty, and Wrong; which again require a special appendix or excursus on the conditions of Legal Liability.

The consideration of the different Modes in which law is made or grows—by custom, by direct enactment, or by judicial decisions—though clearly necessary, appears to me, of all Austin's topics, the one least worthy of independent treatment. Its most convenient place will practically be found in the definition of Positive Law. The subdivision of law, on the other hand, by reference to the Subjects with which it is conversant, is a matter of distinctly substantive character and very high importance. Returning for a moment to the legislator, I may remark that this is the study beyond all others indispensable for the universally desired end of a rational codification. To the ordinary learner, again, hardly any preparative can be of greater value than to know what subdivisions of the immense subject before him have been thought useful, upon what actual differences they depend, what is the importance of those differences, and the resultant worth of the classifications depending upon them.

Such are the preliminary topics with which a law student might

advantageously begin his course of reading, instead of plunging *in medias res*, as many still do. But it must be admitted that the necessary manual scarcely seems to have been yet drawn up. Writers on Jurisprudence have generally erred in one of two ways. They have strayed off into *a priori* speculation, in which case the whole of their work is insecure: or they have entered too much into details of practical law, in which case they lack the simplicity required for an introduction. From the first fault Austin's Jurisprudence is quite free; and, to some extent, from the second. He confines himself absolutely to facts, as known to him: he devotes himself in the main to the consideration of those leading ideas which most require correct apprehension. On the other hand, many of his views, as to fact, must be questioned, chiefly in consequence of historical and philological research which has taken place since his time; some of his illustrations require a knowledge of detailed systems of law which cannot be expected in a beginner; and his style, though severely logical, is neither easy nor attractive. The book should certainly be read as a whole; for all, or almost all, the subjects treated in it are of primary importance, and the periodical selection of a special portion, though convenient for examining bodies as a means of varying their set subjects, has nothing else to recommend it. If a student be constrained, by any such arrangement, to expend his energies specially upon one part of Austin's work, he will do well to take at least a cursory view of the remainder, either in the form of an analysis or of a well-drawn table of contents.

Considerations such as these point to the supersession of Austin's Jurisprudence, except as an exercise for more advanced students, who can weigh and criticise their author instead of merely swallowing his somewhat arbitrary dogmas. For such readers few works could be better suited, provided that a certain amount of comment or reference to other authorities be allowed to qualify what seems to have been hitherto regarded as a sort of gospel truth. It is scarcely necessary to refer to the well-known works of Sir Henry Maine and to the 'Jurisprudence' of Professor Holland, for this purpose.

It is in the same more advanced stage of study, as it appears to me, that a place should be found for that so-called Jurisprudence which deals with Principles of Legislation—which discusses the ends or objects of law, and the comparative merits of the different means adopted for attaining them. Interesting and valuable as such a discussion is, it should certainly come *after* the knowledge of some actual legal system—notably that of the student's own country. Indeed, there is much to be said for the plan followed

by the University of London, which confines this subject exclusively to those few students who proceed to the highest degree of Doctor of Law.

For beginners, the great *desideratum* is a manual of Jurisprudence, very much shorter and simpler than Austin, but based upon the main lines of his scheme. These requirements are so nearly satisfied by Markby's Elements of Law that I hesitate to suggest any improvement upon that useful work. Its acceptance of Austin's strict definition of law appears to me open to question, and its treatment of the subdivision of law by reference to subject-matter is somewhat scanty. Otherwise, its value is beyond question, if some easy form of Jurisprudence be, as I have striven to show, the best commencement for a course of legal study.

E. C. CLARK.

## LIABILITY FOR THE TORTS OF AGENTS AND SERVANTS<sup>1</sup>.

**W**HOEVER commits a wrong is liable for it himself. It is no excuse that he was acting, as an agent or servant, on behalf of principal and for the benefit of another<sup>2</sup>. But that other may well be also liable: and in many cases a man is held answerable for wrongs not committed by himself. The rules of general application in this kind are those concerning the liability of a principal for his agent, and of a master for his servant. Under certain conditions responsibility goes farther, and a man may have to answer for wrongs which, as regards the immediate cause of the damage, are not those of either his agents or his servants. Thus we have cases where a man is subject to a positive duty, and is held liable for failure to perform it. Here, the absolute character of the duty being once established, the question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an 'independent contractor<sup>3</sup>,' but whether the duty has been adequately performed or not. If it has, there is nothing more to be considered, and liability, if any, must be sought in some other quarter<sup>4</sup>. If not, the non-performance in itself, not the causes or conditions of non-performance, is the ground of liability. Special duties created by statute, as conditions attached to the grant of exceptional rights or otherwise, afford the chief examples of this kind. Here the liability attaches, irrespective of any question of agency or personal negligence, if and when the conditions imposed by the Legislature are not satisfied<sup>5</sup>.

There occur likewise, though as an exception, duties of this kind imposed by the common law. Such are the duties of common carriers, of owners of dangerous animals or other things involving, by their nature or position, special risk of harm to their neighbours; and such, to a limited extent, is the duty of occupiers of fixed property to have it in reasonably safe condition and repair, so far as that end can be assured by due care on the part not only of themselves and their servants, but of all concerned.

<sup>1</sup> A chapter from a forthcoming work, being the substance of lectures on the Law of Torts delivered in the Inns of Court.

<sup>2</sup> *Cullen v. Thomson's Trustees & Kerr*, 4 Macq. 424, 432: 'For the contract of agency or service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud,' or any other wrong.

<sup>3</sup> The distinction will be explained below.

<sup>4</sup> See *Hyams v. Webster*, Ex. Ch., L. R. 4 Q. B. 138 (1868).

<sup>5</sup> See *Gray v. Pullen*, Ex. Ch., 5 B. & S. 970.; 34 L. J., Q. B. 265 (1864).

The degrees of responsibility may be thus arranged, beginning with the mildest:

(i) For oneself and specifically authorized agents (this holds always).

(ii) For servants or agents generally (limited to course of employment).

(iii) For both servants and independent contractors (duties as to safe repair, &c.).

(iv) For everything but *vis major* (exceptional: some cases of special risk, and, anomalously, certain public occupations).

Modes of liability for wrongful acts, &c. of others. Apart from the cases of exceptional duty where the responsibility is in the nature of insurance or warranty, a man may be liable for another's wrong—

(1) as having authorized or ratified that particular wrong:

(2) as standing to the other person in a relation making him answerable for wrongs committed by that person in virtue of their relation, though not specifically authorized.

The former head presents little or no difficulty. The latter includes considerable difficulties of principle, and is often complicated with troublesome questions of fact.

Command and ratification.

It scarce needs authority to show that a man is liable for wrongful acts which have been done according to his express command or request, or which, having been done on his account and for his benefit, he has adopted as his own. This is not the less so because the person employed to do an unlawful act may be employed as an 'independent contractor,' so that, supposing it lawful, the employer would not be liable for his negligence about doing it. A gas company employed a firm of contractors to break open a public street, having therefor no lawful authority or excuse; the thing contracted to be done being in itself a public nuisance, the gas company was held liable for injury caused to a foot-passenger by falling over some of the earth and stones excavated and heaped up by the contractors<sup>1</sup>. A point of importance to be noted in this connexion is that only such acts bind a principal by subsequent ratification as were done at the time on the principal's behalf. What is done by the immediate actor on his own account cannot be effectually adopted by another; neither can an act done in the name and on behalf of Peter be ratified either for gain or for loss by John. '*Ratum quis habere non potest, quod ipsius nomine non est gestum*'<sup>2</sup>.

Master and servant.

The more general rule governing the other and more difficult branch of the subject was expressed by Willes J. in a judgment

<sup>1</sup> *Ellis v. Sheffield Gas Consumers Co.*, 2 E. & B. 767; 23 L. J., Q. B. 42 (1853).

<sup>2</sup> *Wilson v. Tumman*, 6 M. & G. 236 (1843), and Serjeant Manning's note, ib. 239.

which may now be regarded as a classical authority. 'The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved<sup>1</sup>.'

No reason for the rule, at any rate no satisfying one, is commonly given in our books. Its importance belongs altogether to the modern law, and it does not seem to be illustrated by any early authority<sup>2</sup>. Blackstone (i. 417) is short in his statement, and has no other reason to give than the fiction of an 'implied command.' It is currently said, *Respondet superior*; which is a dogmatic statement, not an explanation. It is also said, *Qui facit per alium facit per se*; but this is in terms applicable only to authorized acts, not to acts that, although done by the agent or servant 'in the course of the service,' are specifically unauthorized or even forbidden. Again, it is said that a master ought to be careful in choosing fit servants; but if this were the reason, a master could discharge himself by showing that the servant for whose wrong he is sued was chosen by him with due care, and was in fact generally well conducted and competent: which is certainly not the law.

A better account was given by Chief Justice Shaw of Massachusetts. 'This rule,' he said, 'is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it<sup>3</sup>.' This is, indeed, somewhat too widely expressed, for it does not in terms limit the responsibility to cases where at least negligence is proved. But no reader is likely to suppose that, as a general rule, either the servant or the master can be liable where there is no default at all. And the true principle is otherwise clearly enounced. I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.

Some time later the rule was put by Lord Cranworth in a not dissimilar form: the master 'is considered as bound to guarantee third persons against all hurt arising from the carelessness of

<sup>1</sup> *Barwick v. English Joint Stock Bank*, in Ex. Ch. (1867), L. R. 2 Ex. 259, 265. The point of the decision is that fraud is herein on the same footing as other wrongs: of which in due course.

<sup>2</sup> Joseph Brown, Q.C., in evidence before Select Committee on Employers' Liability, 1876, p. 38; Brett L.J., 1877, p. 114.

<sup>3</sup> *Farwell v. Boston & Worcester Railroad Corporation*, 4 Met. 49, and Bigelow, L. C. 688 (1842): the judgment is also reprinted in 3 Macq. 316. So too M. Saint-elletie, the latest Continental writer on the subject, well says: 'La responsabilité du fait d'autrui n'est pas une fiction inventée par la loi positive. C'est une exigence de l'ordre social.' (De la Responsabilité et de la Garantie, p. 124.)

himself or of those acting under his orders in the course of his business<sup>1</sup>.

The statement of Willes J. that the master 'has put the agent in his place to do that class of acts' is also to be noted and remembered as a guide in many of the questions that arise. A just view seems to be taken, though artificially and obscurely expressed, in one of the earliest reported cases on this branch of the law: 'It shall be intended that the servant had authority from his master, it being for his master's benefit<sup>2</sup>.'

Questions  
to be con-  
sidered  
herein.

The rule, then (on whatever reason founded), being that a master is liable for the acts, neglects, and defaults of his servants in the course of the service, we have to define further—

1. Who is a servant.
2. What acts are deemed to be in the course of service.
3. How the rule is affected when the person injured is himself a servant of the same master.

Who is a  
servant:  
responsi-  
bility goes  
with order  
and con-  
trol.

1. As to the first point, it is quite possible to do work for a man, in the popular sense, and even to be his agent for some purposes, without being his servant. The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or, as it has been put, 'retains the power of controlling the work<sup>3</sup>;' and he who does work on those terms is in law a servant for whose acts, neglects, and defaults, to the extent to be specified, the master is liable. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand. For the acts or omissions of such an one about the performance of his undertaking his employer is not liable to strangers, no more than the buyer of goods is liable to a person who may be injured by the careless handling of them by the seller or his men in the course of delivery. If the contract, for example, is to build a wall, and the builder 'has a right to say to the employer, "I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end and not at the other;" there the relation of master and servant does not exist, and the employer is not liable<sup>4</sup>.' 'In ascertaining who is liable for the act of a wrong-doer, you must

<sup>1</sup> *Bartonskill Coal Co. v. Reid*, 3 Macq. 266, 283 (1858).

<sup>2</sup> *Turberville v. Stampe*, 1 Ld. Raym. 264 (end of 17th century).

<sup>3</sup> *Crompton J., Sadler v. Henlock*, 4 E. & B. 570, 578; 24 L. J., Q. B. 138, 141 (1855).

<sup>4</sup> *Bramwell L.J., Emp. L. 77. p. 58*: an extra-judicial statement, but made on an occasion of importance by a great master of the Common Law.

look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable<sup>1</sup>. He who controls the work is answerable for the workman; the remoter employer who does not control it is not answerable. This distinction is thoroughly settled in our law; the difficulties that may arise in applying it are difficulties of ascertaining the facts<sup>2</sup>. It may be a nice question whether a man has let out the whole of a given work to an 'independent contractor,' or reserved so much power of control as to leave him answerable for what is done<sup>3</sup>.

It must be remembered that the remoter employer, if at any point he does interfere and assume specific control, renders himself answerable, not as master, but as principal. He makes himself 'dominus pro tempore.' Thus the hirer of a carriage, driven by a coachman who is not the hirer's servant but the letter's, is not, generally speaking, liable for harm done by the driver's negligence<sup>4</sup>. But if he orders, or by words or conduct at the time sanctions, a specific act of rash or careless driving, he may well be liable<sup>5</sup>. Rather slight evidence of personal interference has been allowed as sufficient in this class of cases<sup>6</sup>.

One material result of this principle is that a person who is habitually the servant of *A* may become, for a certain time and for the purpose of certain work, the servant of *B*; and this although the hand to pay him is still *A*'s. The owner of a vessel employs a stevedore to unload the cargo. The stevedore employs his own labourers; among other men, some of the ship's crew work for him by arrangement with the master, being like the others paid by the stevedore and under his orders. In the work of unloading these men are the servants of the stevedore, not of the owner<sup>7</sup>.

Owners of a colliery, after partly sinking a shaft, agree with a contractor to finish the work for them, on the terms, among others, that engine power and engineers to work the engine are to be provided by the owners. The engine that has been used in excavating the shaft is handed over accordingly to the contractor: the same engineer remains in charge of it, and is still paid by the owners, but

<sup>1</sup> Willes J., *Murray v. Currie*, L. R., 6 C. P. 24, 27 (1870).

<sup>2</sup> One comparatively early case, *Bush v. Steinman*, 1 B. & P. 404, disregards the rule; but that case has been repeatedly commented on with disapproval, and is not now law. See the modern authorities well reviewed in *Hillard v. Richardson* (Sup. Ct., Mass., U. S. 1855), 3 Gray 349, and in Bigelow, L. C. Exactly the same distinction appears to be taken under the Code Napoléon in fixing the limits within which the very wide language of Art. 1384 is to be applied: Sainctelette, *op. cit.*, 127.

<sup>3</sup> *Pendlebury v. Greenhalgh*, C. A., 1 Q. B. D. 36, differing from the view of the same facts taken by the Court of Queen's Bench in *Taylor v. Greenhalgh*, L. R., 9 Q. B. 487.

<sup>4</sup> Even if the driver was selected by himself: *Quarman v. Burnett*, 6 M. & W. 499.

<sup>5</sup> *McLaughlin v. Pryor*, 4 M. & G. 48 (1842).

<sup>6</sup> *Ib.*; *Burgess v. Gray*, 1 C. B. 578. It is difficult in either case to see proof of more than adoption or acquiescence.

<sup>7</sup> *Murray v. Currie*, L. R., 6 C. P. 24 (1870).



is under the orders of the contractor. During the continuance of the work on these terms the engineer is the servant not of the colliery owners but of the contractor<sup>1</sup>.

'Power of  
controlling  
the work'  
explained.

It is proper to add that the 'power of controlling the work' which is the legal criterion of the relation of a master to a servant does not necessarily mean a present and physical ability. Ship-owners are answerable for the acts of the master, though done under circumstances in which it is impossible to communicate with the owners<sup>2</sup>. It is enough that the servant is bound to obey the master's directions if and when communicated to him. The legal power of control is to actual supervision what in the doctrine of possession *animus domini* is to physical detention. But this much is needful: therefore a compulsory pilot, who is in charge of the vessel independently of the owner's will, and, so far from being bound to obey the owner's or master's orders, supersedes the master for the time being, is not the owner's servant, and the statutory exemption of the owner from liability for such a pilot's acts is but in affirmance of the common law<sup>3</sup>.

What is in  
course of  
employ-  
ment.

2. Next we have to see what is meant by the course of service or employment. The injury in respect of which a master becomes subject to this kind of vicarious liability may be caused in the following ways:—

(a) It may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders.

(b) It may be due to the servant's want of care in carrying on the work or business in which he is employed. This is the commonest case.

(c) The servant's wrong may consist in excess or mistaken execution of a lawful authority.

(d) Or it may even be a wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes.

Let us take these heads in order.

Execution  
of specific  
orders.

(a) Here the servant is the master's agent in a proper sense, and the master is liable for that which he has truly, not by the fiction of a legal maxim, commanded to be done. He is also liable for the natural consequences of his orders, even though he wished to avoid them, and desired his servant to avoid them. Thus, in *Gregory v. Piper*<sup>4</sup>, a right of way was disputed between adjacent occupiers, and

<sup>1</sup> *Rourke v. White Moss Colliery Co.*, C. A., 2 C. P. D. 205.

<sup>2</sup> See Maude and Pollock, *Merchant Shipping*, i. 158, 4th ed.

<sup>3</sup> *Merchant Shipping Act*, 1854, s. 388; *The Halley*, L. R., 2 P. C., at p. 201. And see Marsden on *Collisions at Sea*, ch. 5.

<sup>4</sup> 9 B. & C. 591 (1829).

the one who resisted the claim ordered a labourer to lay down rubbish to obstruct the way, but so as not to touch the other's wall. The labourer executed the orders as nearly as he could, and laid the rubbish some distance from the wall, but it soon 'shingled down' and ran against the wall, and in fact could not by any ordinary care have been prevented from doing so. For this the employer was held to answer as for a trespass which he had authorized. This is a matter of general principle, not of any special kind of liability. No man can authorize a thing and at the same time affect to disavow its natural consequences; no more than he can disclaim responsibility for the natural consequences of what he does himself.

(b) Then comes the case of the servant's negligence in the performance of his duty, or rather while he is about his master's business. What constitutes negligence does not just now concern us; Negligence in conduct of master's business. but it must be established that the servant is a wrong-doer, and liable to the plaintiff, before any question of the master's liability can be entertained. Assuming this to be made out, the question may occur whether the servant was in truth on his master's business at the time, or engaged on some pursuit of his own. In the latter case the master is not liable. 'If the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of his servant in doing it'.<sup>1</sup> For example: 'If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, . . . the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment'.<sup>2</sup>

Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome. Departure or deviation from master's business. Distinctions are suggested by some of the reported cases which are almost too fine to be acceptable. The principle, however, is intelligible and rational. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be

<sup>1</sup> *Maule J., Mitchell v. Craswell*, 13 C. B. 237; 22 L. J., C. P. 100 (1853).

<sup>2</sup> *Cryft v. Alison*, 4 B. & A. 590 (1821).

'on a frolic of his own<sup>1</sup>,' the master is no longer answerable for the servant's conduct. Two modern cases of the same class and period, one on either side of the line, will illustrate this distinction.

*Whatman v. Pearson.* In *Whatman v. Pearson*<sup>2</sup>, a carter who was employed by a contractor, having the allowance of an hour's time for dinner in his day's work, but also having orders not to leave his horse and cart, or the place where he was employed, happened to live hard by. Contrary to his instructions, he went home to dinner and left the horse and cart unattended at his door; the horse ran away and did damage to the plaintiff's railings. A jury was held warranted in finding that the carman was throughout in the course of his employment as the contractor's servant 'acting within the general scope of his authority to conduct the horse and cart during the day<sup>3</sup>.'

*Storey v. Ashton.* In *Storey v. Ashton*<sup>4</sup>, a carman was returning to his employer's office with returned empties. A clerk of the same employer's who was with him induced him, when he was near home, to turn off in another direction to call at a house and pick up something for the clerk. While the carman was driving in this direction he ran over the plaintiff. The Court held that if the carman 'had been merely going a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-servant's account, and could not in any way be said to be carrying out his master's employment<sup>5</sup>.' More lately it has been held that if the servant begins using his master's property for purposes of his own, the fact that by way of afterthought he does something for his master's purposes also is not necessarily such a 're-entering upon his ordinary duties' as to make the master answerable for him. A journey undertaken on the servant's own account 'cannot by the mere fact of the man making a pretence of duty by stopping on his way be converted into a journey made in the course of his employment<sup>6</sup>.'

*Williams v. Jones.* The following is a curious example. A carpenter was employed by A with B's permission to work for him in a shed belonging to B. This carpenter set fire to the shed in lighting his pipe with a

<sup>1</sup> Parke B., *Joel v. Morison*, 6 C. & P. 503 (1834): a nisi prius case, but often cited with approval: see *Burns v. Poulson*, L. R., 8 C. P. at p. 567.

<sup>2</sup> L. R., 3 C. P. 422 (1868).

<sup>3</sup> Byles J., at p. 425.

<sup>4</sup> L. R., 4 Q. B. 470 (1869); *Mitchell v. Crassweller*, cited above, was a very similar case.

<sup>5</sup> Lush J., at p. 480. It was 'an entirely new and independent journey, which had nothing at all to do with his employment.' Cockburn C.J., 'Every step he drove was away from his duty.' Mellor J., *ibid.* But it could have made no difference if the accident had happened as he was coming back. See the next case.

<sup>6</sup> *Rayner v. Mitchell*, 2 C. P. D. 357.

shaving. His act, though negligent, having nothing to do with the purpose of his employment, A was not liable to B<sup>1</sup>. It does not seem difficult to pronounce that lighting a pipe is not in the course of a carpenter's employment; but the case was one of difficulty as being complicated by the argument that A, having obtained a gratuitous loan of the shed for his own purposes, was answerable, without regard to the relation of master and servant, for the conduct of persons using it. This failed for want of anything to show that A had acquired the exclusive use or control of the shed. Apart from this, the facts come very near to the case which has been suggested, but not dealt with by the Courts in any reported decision, of a miner opening his safety-lamp to get a light for his pipe, and thereby causing an explosion: where 'it seems clear that the employer would not be held liable<sup>2</sup>.'

(c) Another kind of wrong which may be done by a servant in his master's business, and so as to make the master liable, is the excessive or erroneous execution of a lawful authority. To establish a right of action against the master in such a case it must be shown that (a) the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do; (β) the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful.

Excess or mistake in execution of authority.

The master is chargeable only for acts of an authorized class which in the particular instance are wrongful by reason of excess or mistake on the servant's part. For acts which he has neither authorized in kind nor sanctioned in particular he is not chargeable.

Most of the cases on this head have arisen out of acts of railway servants on behalf of the companies. A porter whose duty is, among other things, to see that passengers do not get into wrong trains or carriages (but not to remove them from a wrong carriage), asks a passenger who has just taken his seat where he is going. The passenger answers, 'To Macclesfield.' The porter, thinking the passenger is in the wrong train, pulls him out; but the train was in fact going to Macclesfield, and the passenger was right. On these facts a jury may well find that the porter was acting within his general authority so as to make the company liable<sup>3</sup>. Here are both error and excess in the servant's action: error in supposing facts to exist which make it proper to use his authority (namely, that the passenger has got into the wrong train); excess in the

Interference with passengers by guards, &c.

<sup>1</sup> *Williams v. Jones*, Ex. Ch., 3 H. & C. 256, 601; 33 L. J., Ex. 297 (1865); diss. *Mellor and Blackburn J.J.*

<sup>2</sup> *R. S. Wright, Emp. L.* 75, p. 47.

<sup>3</sup> *Bayley v. Manchester, Sheffield, & Lincolnshire Railway Co.*, L. R., 7 C. P. 415, in Ex. Ch., 3 C. P. 148 (1872-3).

manner of executing his authority, even had the facts been as he supposed. But they do not exclude the master's liability.

'A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held responsible for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment<sup>1</sup>.'

*Seymour v. Greenwood*<sup>2</sup> is another illustrative case of this class. The guard of an omnibus removed a passenger whom he thought it proper to remove as being drunken and offensive to the other passengers, and in so doing used excessive violence. Even if he were altogether mistaken as to the conduct and condition of the passenger thus removed, the owner of the omnibus was answerable. 'The master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself.'

Arrest of  
supposed  
offenders.

Another kind of case under this head is where a servant takes on himself to arrest a supposed offender on his employer's behalf. Here it must be shown, both that the arrest would have been justified if the offence had really been committed by the party arrested, and that to make such an arrest was within the employment of the servant who made it. As to the latter point, however, 'where there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority is *prima facie* evidence that he had authority<sup>3</sup>.' Railway companies have accordingly been held liable for wrongful arrests made by their inspectors or other officers as for attempted frauds on the company punishable under statutes or authorized by-laws, and the like<sup>4</sup>.

Act wholly  
outside  
authority,  
master  
not liable.

But the master is not answerable if the servant takes on himself, though in good faith and meaning to further the master's interest, that which the master has no right to do even if the facts were as the servant thinks them to be: as where a station-master arrested a passenger for refusing to pay for the carriage of a horse, a thing outside the company's powers<sup>5</sup>. The same rule holds if the par-

<sup>1</sup> Per Willes J., *Bayley v. Manchester, Sheffield, & Lincolnshire Ry. Co.*, L.R., 7 C.P. 415.

<sup>2</sup> 7 H. & N. 355; 30 L.J., Ex. 189, 327, Ex. Ch. (1861).

<sup>3</sup> Blackburn J., *Moore v. Metrop. Ry. Co.*, L.R., 8 Q.B. 36, 39.

<sup>4</sup> *Ib.*, following *Goff v. Gt. N. Ry. Co.*, 3 E. & E. 672; 30 L.J., Q.B. 148 (1861).

<sup>5</sup> *Poulton v. L. & S. W. Ry. Co.*, L.R., 2 Q.B. 534.

ticular servant's act is plainly beyond his authority, as where the officer in charge of a railway station arrests a man on suspicion of stealing the company's goods, an act which is not part of the company's general business nor for their apparent benefit<sup>1</sup>. In a case not clear on the face of it, as where a bank manager commences a prosecution, which turns out to be groundless, for a supposed theft of the bank's property—a matter not within the ordinary routine of banking business, but which might in the particular case be within the manager's authority—the extent of the servant's authority is a question of fact<sup>2</sup>. Much must depend on the nature of the matter in which the authority is given. Thus an agent intrusted with general and ample powers for the management of a farm has been held to be clearly outside the scope of his authority in entering on the adjacent owner's land on the other side of a boundary ditch in order to cut underwood which was choking the ditch and hindering the drainage from the farm. If he had done something on his employer's own land which was an actionable injury to adjacent land, the employers might have been liable. But it was thought unwarrantable to say 'that an agent intrusted with authority to be exercised over a particular piece of land has authority to commit a trespass on other land<sup>3</sup>.'

(d) Lastly, a master may be liable even for wilful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes: and this, no less than in other cases, although the servant's conduct is of a kind actually forbidden by the master. Sometimes it has been said that a master is not liable for the 'wilful and malicious' wrong of his servant. If 'malicious' means 'committed exclusively for the servant's private ends,' or 'malice' means 'private spite<sup>4</sup>,' this is a correct statement; otherwise it is contrary to modern authority. The question is not what was the nature of the act in itself, but whether the servant intended to act in the master's interest.

This was decided by the Exchequer Chamber in *Limpus v. London General Omnibus Company*<sup>5</sup>, where the defendant company's driver had obstructed the plaintiff's omnibus by pulling across the road in front of it, and caused it to upset. He had printed instructions not to race with or obstruct other omnibuses. Martin B. directed the jury, in effect, that if the driver acted in the way of his employment and in the supposed interest of his employers as against a rival

<sup>1</sup> *Edwards v. L. & N. W. Ry. Co.*, L. R., 5 C. P. 445; *op. Allen v. L. & S. W. Ry. Co.*, L. R., 6 Q. B. 65.

<sup>2</sup> *Bank of New South Wales v. Owen* (J. C.), 4 App. Ca. 270.

<sup>3</sup> *Holingbroke v. Swindon Local Board*, L. R., 9 C. P. 575 (1874).

<sup>4</sup> See per Blackburn J., 1 H. & C. 543.

<sup>5</sup> 1 H. & C. 526; 32 L. J., Ex. (1862). This and *Seymour v. Greenwood* (above) overrule *M'Manus v. Crickett*, 1 East, 106.

Wilful  
trespasses,  
&c. for  
master's  
purposes.

in their business, the employers were answerable for his conduct, but they were not answerable if he acted only for some purpose of his own: and this was approved by the Court<sup>1</sup> above. The driver 'was employed not only to drive the omnibus, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with his employment, when explained by his desire to get before the other omnibus.' As to the company's instructions, 'the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability<sup>2</sup>.'

Fraud of  
agent or  
servant.

That an employer is liable for frauds of his servant committed without authority, but in the course of the service and for the employer's purposes, was established with more difficulty; for it seemed harsh to impute deceit to a man personally innocent of it, or (as in the decisive cases) to a corporation, which, not being a natural person, is incapable of personal wrong-doing<sup>3</sup>. But when it was fully realized that in all these cases the master's liability is imposed by the policy of the law without regard to personal default on his part, so that his express command or privity need not be shown, it was a necessary consequence that fraud should be on the same footing as any other wrong<sup>4</sup>. So the matter is handled in our leading authority, the judgment of the Exchequer Chamber delivered by Willes J. in *Barwick v. English Joint Stock Bank*.

'With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong<sup>5</sup>.'

This has been more than once fully approved in the Privy Council<sup>6</sup>, and may now be taken, notwithstanding certain appearances of conflict<sup>7</sup>, to have the approval of the House of Lords also<sup>8</sup>. What has been said to the contrary was either extra-judicial, as going beyond the *ratio decidendi* of the House, or is to be accepted as limited to the particular case where a member of an incorporated company, not having ceased to be a member, seeks to charge the

<sup>1</sup> Williams, Crompton, Willes, Byles, Blackburn J.J., *q. diss.* Wightman J.

<sup>2</sup> Willes J., 1 H. & C., at p. 539.

<sup>3</sup> This particular difficulty is fallacious. It is in truth neither more nor less easy to think of a corporation as deceiving (or being deceived) than as having a consenting mind. In no case can a corporation be invested with either rights or duties except through natural persons who are its agents.

<sup>4</sup> It makes no difference if the fraud includes a forgery: *Shaw v. Port Philip Gold Mining Co.*, 13 Q. B. D. 103.

<sup>5</sup> L. R., 2 Ex. at p. 265.

<sup>6</sup> *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 P. C. 412 (1874); *Swire v. Francis*, 3 App. Ca. 106 (1877).

<sup>7</sup> *Addie v. Western Bank of Scotland*, L. R., 1 Sc. & D. 145, dicta at pp. 158, 166, 167.

<sup>8</sup> *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317.

company with the fraud of its directors or other agents in inducing him to join it<sup>1</sup>.

The leading case of *Mersey Docks Trustees v. Gibbs*<sup>2</sup> may also be referred to in this connexion, as illustrating the general principles according to which liabilities are imposed on corporations and public bodies.

There is abundant authority in partnership law to show that a firm is answerable for fraudulent misappropriation of funds, and the like, committed by one of the partners in the course of the firm's business and within the scope of his usual authority, though no benefit be derived therefrom by the other partners. But, agreeably to the principles above stated, the firm is not liable if the transaction undertaken by the defaulting partner is outside the course of partnership business. Where, for example, one of a firm of solicitors receives money to be placed in a specified investment, the firm must answer for his application of it, but not, as a rule, if he receives it with general instructions to invest it for the client at his own discretion<sup>3</sup>. Again, the firm is not liable if the facts show that exclusive credit was given to the actual wrong-doer<sup>4</sup>. In all these cases the wrong is evidently wilful. In all or most of them, however, it is at the same time a breach of contract or trust. And it seems to be on this ground that the firm is held liable even when the defaulting partner, though professing to act on behalf of the firm, misapplies funds or securities, merely for his own separate gain. The reasons given are not always free from admixture of the Protean doctrine of 'making representations good,' which is now, I venture to think, exploded<sup>5</sup>.

3. There remains to be considered the modification of a master's liability for the wrongful act, neglect, or default of his servant when the person injured is himself in and about the same master's service. It is a topic far from clear in principle; the Employers' Liability Act, 1880, has obscurely indicated a sort of counter

<sup>1</sup> *Ib.*, Lord Selborne at p. 326, Lord Hatherley at p. 331; Lord Blackburn's language at p. 339 is more cautious, perhaps for the very reason that he was a party to the decision of *Berwick v. English Joint Stock Bank*. Shortly, the shareholder is in this dilemma: while he is a member of the company, he is damaged by the alleged deceit, if at all, solely in that he is liable as a shareholder to contribute to the company's debts: this liability being of the essence of a shareholder's position, claiming compensation from the company for it involves him in a new liability to contribute to that compensation itself, which is an absurd circuitry. But if his liability as a shareholder has ceased, he is no longer damaged. Therefore restitution only (by rescission of his contract), not compensation, is the shareholder's remedy as against the company: though the fraudulent agent remains personally liable.

<sup>2</sup> L. R., 1 H. L. 93 (1864-6).

<sup>3</sup> *Cp. Blair v. Bromley*, 2 Ph. 354, and *Cleather v. Twisden*, 24 Ch. D. 731, with *Harnan v. Johnson*, 2 K. & B. 61.

<sup>4</sup> *Ex parte Eyre*, 1 Ph. 227. See more illustrations in my 'Digest of the Law of Partnership,' art. 24.

<sup>5</sup> I have discussed it in Appendix L. to 'Principles of Contract,' 3rd ed. (N. in 4th ed.) See now *Madison v. Alderson*, 8 App. Ca., at p. 473.



Common  
law rule of  
master's  
immunity.

Reason  
given in  
the later  
cases.

principle, and introduced a number of minute and empirical exceptions, or rather limitations of the exceptional rule in question. That rule, as it stood before the Act of 1880, is that a master is not liable to his servant for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service. Our law can show no more curious instance of a rapid modern development. The first evidence of any such rule is in *Priestley v. Fowler*<sup>1</sup>, decided in 1837, which proceeds on the theory (if on any definite theory) that the master 'cannot be bound to take more care of the servant than he may reasonably be expected to do of himself;' that a servant has better opportunities than his master of watching and controlling the conduct of his fellow-servants; and that a contrary doctrine would lead to intolerable inconvenience, and encourage servants to be negligent. According to this there would be a sort of presumption that the servant suffered to some extent by want of diligence on his own part. But it is needless to pursue this reasoning; for the like result was a few years afterwards arrived at by Chief Justice Shaw of Massachusetts by another way, and in a judgment which is the fountain-head of all the later decisions<sup>2</sup>. The accepted doctrine is to this effect. Strangers can hold the master liable for the negligence of a servant about his business. But in the case where the person injured is himself a servant in the same business, he is not in the same position as a stranger. He has of his free will entered into the business and made it his own. He cannot say to the master, You shall so conduct your business as not to injure me by want of due care and caution therein. For he has agreed with the master to serve in that business, and his claims on the master depend on the contract of service. Why should it be an implied term of that contract, not being an express one, that the master shall indemnify him against the negligence of a fellow-servant, or any other current risk? It is rather to be implied that he contracted with the risk before his eyes, and that the dangers of the service, taken all round, were considered in fixing the rate of payment. This is, I believe, a fair summary of the reasoning which has prevailed in the authorities. With its soundness we are not here concerned. It was not only adopted by the House of Lords for England, but forced by them upon the reluctant Courts of Scotland to make the jurisprudence of the two countries uniform<sup>3</sup>. No such doctrine appears to exist in the law of any other country in Europe.

<sup>1</sup> 3 M. & W. 1. All the case actually decided was that a master does not warrant to his servant the sufficiency and safety of a carriage in which he sends him out.

<sup>2</sup> *Farwell v. Boston & Worcester Railroad Corporation*, 4 Met. 49.

<sup>3</sup> See *Wilson v. Merry*, L. R., 1 Sc. & D. 326.

The following is a clear judicial statement of it in its settled form: 'A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both<sup>1</sup>.'

The phrase 'common employment' is frequent in this class of cases. But it is misleading in that it suggests a limitation of the rule to circumstances where the injured servant had in fact some opportunity of observing and guarding against the conduct of the negligent one; a limitation rejected by the Massachusetts Court in Farwell's case, where an engine-driver was injured by the negligence of a switchman (pointsman, as we say on English railways) in the same company's service, and afterwards constantly rejected by the English Courts.

The servants need not be about the same kind of work:

'When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight or voice, and yet acting together.

'Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied<sup>2</sup>.'

<sup>1</sup> Erle C.J. in *Tunney v. Midland Ry. Co.*, L. R., 1 C. P., at p. 296 (1866); Archibald J. used very similar language in *Lorell v. Howell* (1876), 1 C. P. D., at p. 167.

<sup>2</sup> Shaw C.J., *Farwell v. Boston, &c. Corporation*, 4 Met. 49. M. Sainctelette of Brussels, and M. Sauzet of Lyons, whom he quotes (*op. cit.* p. 140), differ from the

provided  
there is a  
general  
common  
object.

So it has been said that 'we must not over-refine, but look at the common object, and not at the common immediate object<sup>1</sup>.' All persons engaged under the same employer for the purposes of the same business, however different in detail those purposes may be, are fellow-servants in a common employment within the meaning of this rule: for example, a carpenter doing work on the roof of an engine-shed and porters moving an engine on a turn-table<sup>1</sup>. 'Where there is one common general object, in attaining which a servant is exposed to risk, he is not entitled to sue the master if he is injured by the negligence of another servant whilst engaged in furthering the same object<sup>2</sup>.'

Relative  
rank of the  
servants  
immaterial.

It makes no difference if the servant by whose negligence another is injured is a foreman, manager, or other superior in the same employment, whose orders the other was by the terms of his service bound to obey. The foreman or manager is only a servant having greater authority: foreman and workmen, of whatever rank, and however authority and duty may be distributed among them, are 'all links in the same chain<sup>3</sup>.' The master is bound, as between himself and his servants, to exercise due care in selecting proper and competent persons for the work (whether as fellow-workmen in the ordinary sense, or as superintendents or foremen), and to furnish suitable means and resources to accomplish the work<sup>4</sup>, and he is not answerable further<sup>5</sup>.

Volunteer  
assistant is  
on same

Moreover, a stranger who gives his help without reward to a man's servants engaged in any work is held to put himself, as

current view among French-speaking lawyers, and agree with Shaw C.J. and our Courts, in referring the whole matter to the contract between the master and servant; but they arrive at the widely different result of holding the master bound, as an implied term of the contract, to insure the servant against all accidents in the course of the service, and not due to the servant's own fault or *vis major*.

<sup>1</sup> Pollock C.B., *Morgan v. Vale of Neath Ry. Co.*, Ex. Ch., L. R., 1 Ex. 149, 155 (1865).

<sup>2</sup> Thesiger L.J., *Charles v. Taylor*, 3 C. P. D. 492, 498.

<sup>3</sup> *Feltham v. England*, L. R., 2 Q. B. 33 (1866); *Wilson v. Merry*, L. R., 1 Sc. & D. 326 (1868): see per Lord Cairns at p. 333, and per Lord Colonsay at p. 345. The French word *collaborateur*, which does not mean 'fellow-workman' at all, was at one time absurdly introduced into these cases, it is believed by Lord Brougham, and occurs as late as *Wilson v. Merry*.

<sup>4</sup> According to some decisions, which seem on principle doubtful, he is bound only not to furnish means or resources which are to his own knowledge defective: *Gallagher v. Piper*, 16 C. B., N. S. 669; 33 L. J., C. P. 329 (1864). And quite lately it has been decided in the Court of Appeal that where a servant seeks to hold his master liable for injury caused by the dangerous condition of a building where he is employed, he must allege distinctly both that the master knew of the danger and that he, the servant, was ignorant of it: *Griffiths v. London & St. Katharine's Dock Co.*, 13 Q. B. D. 259.

<sup>5</sup> Lord Cairns, as above: to same effect Lord Wensleydale, *Weems v. Mathieson*, 4 Macq., at p. 227 (1861): 'All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen in a fit and proper manner.' In *Skipp v. E. C. Ry. Co.*, 9 Ex. 223; 23 L. J., Ex. 23 (1853), it was said that this duty does not extend to having a sufficient number of servants for the work: *sed qu*. The decision was partly on the ground that the plaintiff was in fact well acquainted with the risk and had never made any complaint.

regards the master's liability towards him, in the same position as if he were a servant. Having of his free will (though not under a contract of service) exposed himself to the ordinary risks of the work and made himself a partaker in them, he is not entitled to be indemnified against them by the master any more than if he were in his regular employment<sup>1</sup>.

On the other hand, a master who takes an active part in his own work is not only himself liable to a servant injured by his negligence, but, if he has partners in the business, makes them liable also. For he is the agent of the firm, but not a servant<sup>2</sup>: the partners are generally answerable for his conduct, yet cannot say he was a fellow-servant of the injured man.

Such were the results arrived at by a number of modern authorities, which it seems useless to cite in more detail<sup>3</sup>: the rule, though not abrogated, being greatly limited in application by the statute of 1880. This Act (43 & 44 Vict. c. 42) is on the face of it an experimental and empirical compromise between conflicting interests. It is temporary, being enacted only for seven years and the next session of Parliament; it is confined in its operation to certain specified causes of injury; and only certain kinds of servants are entitled to the benefit of it, and then upon restrictive conditions as to notice of action, mode of trial, and amount of compensation, which are unknown to the common law. The effect is that a 'workman' within the meaning of the Act is put as against his employer in approximately (not altogether, I think) the same position as an outsider as regards the safe and fit condition of the material instruments, fixed or moveable, of the master's business. He is also entitled to compensation for harm incurred through the negligence of another servant exercising superintendence, or by the effect of specific orders or rules issued by the master or some one representing him; and there is a special wider provision for the benefit of railway servants, which virtually abolishes the master's immunity as to railway accidents in the ordinary sense of that term. So far as the Act has any principle, it is that of holding the employer answerable for the conduct of those who are in delegated authority under him. It is noticeable that almost all the litigation upon the Act has been caused either by its minute provisions as to notice of action, or by desperate attempts to evade those parts of its language which are plain enough to common sense.

<sup>1</sup> *Potter v. Faulkner*, Ex. Ch., 1 B. & S. 800; 31 L. J., Q. B. 30 (1861), approving *Degg v. Midland Ry. Co.*, 1 H. & N. 773; 26 L. J., Ex. 174 (1857).

<sup>2</sup> *Askworth v. Stanwix*, 3 E. & E. 701; 30 L. J., Q. B. 183 (1861).

<sup>3</sup> They are well collected by Mr. Horace Smith (*Law of Negligence*, pp. 73-76, 2nd ed.).

Resulting  
complica-  
tion of the  
law.

On the whole we have, in a matter of general public importance and affecting large classes of persons who are neither learned in the law nor well able to procure learned advice, the following singularly intricate and clumsy state of things.

First, there is the general rule of a master's liability for his servants (itself in some sense an exceptional rule to begin with).

Secondly, the immunity of the master where the person injured is also his servant.

Thirdly, in the words of the marginal notes of the Employers' Liability Act, 'amendment of law' by a series of elaborate exceptions to that immunity.

Fourthly, 'exceptions to amendment of law' by provisoes which are mostly but not wholly re-statements of the common law.

Fifthly, minute and vexatious regulations as to procedure in the cases within the first set of exceptions.

It is incredible that such a state of things should nowadays be permanently accepted either in substance or in form. This however is not the place to discuss the principles of the controversy, which I have attempted to do elsewhere<sup>1</sup>. It does not appear that any similar controversy has taken place in the United States, where the doctrine laid down by the Supreme Court of Massachusetts in *Farwell's case* has been very generally followed. Except in Massachusetts, however, an employer does not so easily avoid responsibility by delegating his authority, as to choice of servants or otherwise, to an intermediate superintendent<sup>2</sup>.

FREDERICK POLLOCK.

<sup>1</sup> *Essays in Jurisprudence and Ethics* (1882), ch. 5. See for very full information and discussion on the whole matter the evidence taken by the Select Committees of the House of Commons in 1876 and 1877 (*Parl. Papers*, H. C., 1876, 372; 1877, 285).

<sup>2</sup> *Cooley on Torts*, 560; *Shearman and Redfield*, ss. 86, 88, 102. And see the late case of *Chicago M. & S. Ry. Co. v. Ross*, in the Supreme Court, U.S., *Washington Law Reporter*, Dec. 20, 1884.

## NOTES INÉDITES DE BENTHAM SUR LE DROIT INTERNATIONAL

**D**ANS l'édition des *Œuvres* de Bentham que M. John Bowring, son exécuteur testamentaire, publia en 1843, figurent sous le titre de *Principles of international Law*, quatre essais traitant successivement des buts du droit international, des sujets ou de l'étendue personnelle des lois d'un Etat, de la guerre envisagée dans ses causes et dans ses effets, enfin d'un projet de paix universelle et perpétuelle.

Les manuscrits d'après lesquels ces fragments furent imprimés datent de 1786 à 1789. A cette époque, Bentham était dans toute la vigueur de son talent et de son génie. Le *Fragment sur le gouvernement* et la *Défense de l'usure* l'avaient rendu célèbre, et il était à la veille de publier l'*Introduction aux principes de la morale et de la législation*. Le principe de l'utilité n'avait pas encore trouvé sa formule définitive : 'Le plus grand bonheur du plus grand nombre ;' mais l'idée même avait germé depuis longtemps ; elle s'était développée, et, féconde, elle produisait déjà ses fruits.

Dans les *Essais* dont nous parlons, Bentham demande quel but se proposerait un citoyen du monde s'il s'était chargé de rédiger un code du droit des gens universel.

D'après lui, ce but serait l'utilité commune de toutes les nations, dont les droits et les devoirs se résument en ceci : ne faire aucun mal aux autres nations, leur faire le plus grand bien ; ne souffrir d'elles aucun dommage, en recevoir le plus grand bien.

En cas de violation de ces droits et de non-observation de ces devoirs, Bentham permet de chercher satisfaction dans la guerre ; seulement il enseigne qu'un code international devrait créer des arrangements tels que la guerre produise le moins de mal possible. Dans un autre de ses écrits, il considère la guerre comme une espèce de procédure par laquelle on cherche de part et d'autre à se mettre en possession des avantages, qu'on s'est respectivement adjugés. Cette idée se trouve également ici et dans le code international, les lois de la paix formeront le droit substantif, tandis que les lois de la guerre seront le droit adjectif.

Aux causes diverses de guerre le célèbre jurisconsulte oppose quatre remèdes : la codification des lois non-écrites déjà établies par l'usage, la conclusion de conventions sur tous les points indéterminés, le perfectionnement du style des lois et des actes, et le projet de paix perpétuelle.

Le projet de paix perpétuelle s'appuie sur une double proposition,

la réduction des forces militaires des puissances européennes et l'émancipation des colonies, et il comprend l'établissement d'un tribunal arbitre ou congrès composé de deux délégués par puissance. Le tribunal aurait divers pouvoirs ; il prononcerait sa décision et la ferait publier, dans les territoires des Etats en cause ; il mettrait éventuellement l'Etat réfractaire au ban de l'Europe ; enfin, mode d'action suprême, il fixerait le contingent que les Etats auraient à fournir pour exécuter ses sentences. S'il faut en croire Bentham, cette dernière nécessité ne se présenterait même pas. Il suffirait pour l'éviter d'accorder au congrès la faculté de donner la plus grande publicité à ses jugements motivés.

Telle est dans ses lignes générales la substance des *Principles of international law*. Ceux-ci ne virent le jour qu'après la mort de leur auteur ; chose étonnante, dans les nombreux écrits parus de son vivant, Bentham qui semblait fait pour l'étude des lois gouvernant les rapports des Etats, ne touche qu'accessoirement à cette matière importante. A première vue cependant il semble impossible que le droit des gens n'ait point occupé son esprit durant les longues années d'admirable activité qu'il lui fut donné de consacrer à la science juridique, et l'on se demande si ici encore, de véritables trésors ne sont pas demeurés enfouis dans ses innombrables notes manuscrites et si le monde n'a pas à déplorer sous ce rapport d'irréparables pertes. Nous sommes malheureusement réduits à faire sur ce point des conjectures ; mais un fait résulte au moins d'une liasse de lettres qui reposent au British Museum, c'est qu'au déclin de sa noble vie, à l'âge de près de quatre-vingts ans, Bentham avait repris l'examen de l'objet qui l'avait intéressé en 1786. Ces lettres sont adressées à Jabez Henry et s'espacent entre juillet 1827 et janvier 1830<sup>1</sup>.

Après avoir occupé des fonctions judiciaires à Corfou et aux Îles Ioniennes et présidé la cour de Demerara et Essequibo, Jabez Henry s'était fixé à Londres où nous le trouvons comme barrister-at-law de Middle Temple. En 1821, il avait publié une étude sur le droit criminel en vigueur dans la Guyane anglaise, et en 1823, il avait écrit au sujet d'un arrêt de la cour de Demerara, un livre qui lui fait une place honorable parmi les auteurs de droit international privé<sup>2</sup>. Bowring le mit en rapport avec Bentham et par une première lettre du 30 juillet 1827, ce dernier l'invite à lui faire visite<sup>3</sup>. Des lettres subséquentes de Bentham lui-même, de

<sup>1</sup> Add. MS. no. 30,151.

<sup>2</sup> Alphonse Rivier, 'Eléments de Droit International Privé,' d'Asser, p. 274.

<sup>3</sup> 'Sra, 'Queen's Square Place, Westminster, 30 July, 1827.

'Our common friend, Bowring, has had for some time past in his busy head a scheme for bringing us together ; and for this purpose he has been labouring to make me believe that on your part inclination for such a meeting is not wanting. On my part a reciprocal

Bowring, ou du secrétaire de Bentham témoignent de relations assez suivies ; c'est ainsi que Bentham, toujours préoccupé de la rédaction de ses codes, demande à Henry un exemplaire du code Ionien ; c'est ainsi aussi que nous le voyons emprunter à son ami les Commentaires du chancelier Kent, dont le premier volume venait de paraître en 1826.

Au commencement de 1829, Henry s'adresse au secrétaire de Bentham à l'effet d'obtenir communication de quelques notes manuscrites de ce dernier ; une première fois, on lui répond que le 'Vénérable Législateur,' comme ses amis et ses admirateurs se plaisaient à l'appeler, est trop occupé en ce moment, mais bientôt il est déferé au désir exprimé, et Henry reçoit copie d'un certain nombre de feuillets relatifs au droit international ; Bentham s'est donné la peine de collationner la transcription et de corriger le texte de sa main. Ce sont ces notes que nous examinerons rapidement.

Un premier feuillet comprend huit articles qui méritent d'être reproduits in-extenso :—

'Art. 1. The political States concerned in the establishment of the present all-comprehensive International Code are those which follow.

☞ Here enumerate them in alphabetical order to avoid the assumption of superiority from precedence in the order of enumeration.

'Art. 2. The equality of all is hereby recognised by all.

'Art. 3. Each has its own form of government ; each respects the form of government of every other.

'Art. 4. Each has its own opinions and enactments on the subject of religion ; each respects that of every other.

'Art. 5. Each has its own manners, customs and opinions ; each respects the manners, customs and opinions of every other.

'Art. 6. This Confederation, with the Code of international Law

wish to make acquaintance with a gentleman of whose disposition, added to the power of doing what I myself should call good, and that upon a very extensive scale, such favourable reports have reached me, is what he might venture to assure you of without fear of being contradicted. The only hours I can afford to abstract from my unceasing labours are the convivial ones. The earliest day I have free is Thursday next. On that day, if you can put up for once with a Hermit's dinner, the Hermitage will open itself to you with unfeigned pleasure. At half-past six the dinner finds its way to the table : but as this place has some particularities in it by which considerable interest is commonly excited, a quarter of an hour may perhaps be not unpleasantly employed in the observation of them.

'Should this find you engaged for Thursday, I have still Friday free, and should with pleasure dispose of it in the same manner.

'I am, Sir, yours, sincerely,

'JEREMY BENTHAM.'

'J. Henry, Esq., &c. &c. &c.

'P.S. The gate in the iron railing to the garden bounded by the Barracks in the Bird-cage Walk opens into a walk which, through a higher iron gate, will conduct you to the house ; they will be left open for your reception, and save you from the approach by a dark lane that leads to it from the Broadway.'



approved, adopted and sanctioned by it, has for its objects, or say ends, in view the preservation, not only of peace (in the sense in which by peace is meant absence of war), but of mutual good-will and consequent mutual good offices between all the several members of this confederation.

'Art. 7. The means by which it aims at the attainment of this so desirable end—and the effectuation of this universally desirable purpose—is the adjustment and preappointed definition of all rights and obligations that present themselves as liable and likely to come into question: to do this at a time when no state having any interest in the question more than any other has, the several points may be adjusted by common consent of all, without any such feeling as that of disappointment, humiliation or sacrifice on the part of any: adjusted at a time when no detriment to self-regarding interest, on the part of any having or by the part of any supposed to have place, no such cause of antisocial affection will have place in any of the breasts concerned.

'Art. 8. Of each of these several confederating States the government can do no otherwise than desire to be regarded as persuaded that its own form of government is in its nature, in a higher degree than any other, conducive to the greatest happiness of the whole number of the members of the community of which it is the government: and by this declaration it means not to contest the fitness of any other for governing in the community in which it bears rule.'

Il s'agit, on le voit, d'un véritable titre préliminaire du code international projeté par l'illustre jurisconsulte. Nous ne nous arrêtons pas à le discuter; mais il est quelques observations que nous croyons utile de faire. Un premier point intéressant à noter, c'est que dès le début son esprit essentiellement logique, nullement historique, se trahit et s'affirme. L'égalité des Etats est proclamée à l'égal d'un dogme; Bentham voit en elle la pierre angulaire de l'édifice international. Or, il est facile de toucher ici du doigt l'influence de l'Ecole dont Jean Jacques Rousseau fut l'éloquent interprète. L'égalité des hommes, article formel de la foi des écrivains du XVIII<sup>e</sup> siècle, a dû confirmer les juristes dans l'idée de l'égalité des Etats, et au fond de l'une et de l'autre maxime se trouve évidemment la croyance à un droit de la nature. Il est une autre remarque que suggère la lecture des notes que nous venons de reproduire. Bentham applique, *mutatis mutandis*, les principes émis dans sa *Déontologie*. L'idée inscrite dans l'article 6 est, d'autre part, une réminiscence des Essais de 1786. Là, l'auteur développait sa pensée d'une façon saisissante: 'Le législateur, disait-il, doit chercher à empêcher les délits internationaux et à encourager les actions utiles

entre les peuples. Il doit regarder comme un crime positif chaque action par laquelle une nation ferait plus de mal aux nations étrangères réunies dont les intérêts seraient en question, qu'elle ne se ferait de bien à elle-même . . . De la même manière il doit regarder comme un délit négatif, chaque résolution par laquelle une nation refuserait de rendre des services positifs à une nation étrangère, lorsqu'en accordant les services demandés, elle ferait plus de bien à cette nation étrangère qu'elle ne se ferait de mal à elle-même.'

Le préambule du code international est daté du 11 juin 1827. Le même jour, Bentham, toujours soucieux de coucher sur le papier ses pensées, qu'il confinait ensuite dans ses 'repositories,' souvent pour ne plus les retoucher ou même pour ne plus les revoir, rédige quelques autres réflexions dont nous retrouvons copie dans les notes confiées à Jabez Henry. Cette nouvelle série est reproduite sur des feuillets divisés en quatre colonnes. Les idées ne se suivent pas fort méthodiquement, mais elles méritent cependant que nous les passions en revue.

Bentham suggère l'idée de la rédaction d'un corps de droit international par un congrès qui serait composé d'un délégué par Etat civilisé, ce qui, dit-il, revient à dire d'un délégué par Etat chrétien. Ce n'est pas cependant qu'il se fasse illusion ni qu'il voie dans le corps de droit international une panacée universelle. Il est une chose que, de son aveu, pareil corps de droit n'effectuera jamais, c'est d'empêcher un souverain qui a des buts de conquête, de poursuivre l'exécution de ses desseins, mais la réalisation du projet aurait du moins pour effet de réduire au minimum, de *minimiser* pour imiter son néologisme expressif, les occasions de ressentiment.

Dans cette première idée s'enchevêtrent l'idée de conférer des fonctions judiciaires au congrès des délégués des nations et cette autre idée de transformer les ministres plénipotentiaires auprès de chaque Etat en commission du congrès. L'auteur incline même à aller plus loin et à former le premier degré de juridiction pour les affaires internationales d'un juge unique élu par le congrès et investi des fonctions élémentaires du pouvoir judiciaire, à l'exception du pouvoir de commandement. Bentham n'admet pas, du reste, qu'en droit international, un pouvoir quelconque, fût-ce le congrès, exerce l'autorité *impérative*: 'Under a system of international law the imperative could not be exercised by any authority: not even by the international congress. The admission of the faculty of issuing imperative decrees with power for giving execution and effect to them, would have the effect of an attempt to establish an Universal Republic, inconsistent with the Sovereignty of the several Sovereigns within their respective dominions.' Seulement, il soutient qu'il est une foule de questions que,

de nos jours, les Etats ont à honneur de trancher personnellement, alors qu'envisagées en elles-mêmes elles sont indifférentes, et c'est précisément sur ces questions que la décision du pouvoir judiciaire international prévaudrait probablement dans l'avenir si elle s'appuyait sur une argumentation sérieuse et rendue publique. 'On all such matters the decision of a judicatory, if grounded on argumentation universally notorious, would possess a probability of experiencing general if not universal deference.'

Bentham soulève quelques questions accessoires, ainsi celle de la fixité ou de la non-fixité du siège du congrès. 'Seat of the Congress, shall it be fixed or ambulatory? If ambulatory, should it be changing from year to year, two years, or three years, at the several metropolises, the order to be determined by lot?' Cette idée de recourir au sort amène une déclaration piquante: 'Nota bene, écrit Bentham, lot would be a good instrument in various cases.' Autre suggestion: 'The decision of the Congress judicatory should be pronounced in both ways: viz. (1) by open—or (2) by secret suffrage. Query, which first?'

Le grand penseur n'avait jamais eu une bien grande estime pour le livre classique de Vattel. A diverses reprises il le jugea avec sévérité. 'Vattel's propositions, disait-il un jour, are most old-womanish and tautological. They come to this: Law is nature—nature is law. He builds upon a cloud. When he means anything, it is from a vague perception of the principle of utility, but more frequently no meaning can be found. Many of his dicta amount to this: It is not just to do that which is unjust<sup>1</sup>.' Dans les notes dont nous nous occupons, il déclare que le livre de Vattel n'est pas à la hauteur du sujet qu'il traite, mais, à son avis, un ouvrage analogue pourrait avoir une grande utilité. Il appert même d'un projet de lettre de Henry que Bentham a recommandé à celui-ci de faire 'a new edition of Vattel, or rather a new work on a similar principle...'

Un peu plus loin Bentham revient à son idée de l'égalité des Etats: 'Fundamental principles to be agreed upon by all the States: (1) Universal equality. No State to pretend to any authority over any other State (a) on sea, (b) on land in the territory of a barbarous nation not being a member of the Congress. (2) All States to be upon a par in Congress, whatsoever be the form of government.' Il affirme sa foi dans la puissance de l'opinion publique: 'The judicatory in *dernier ressort* would in effect be the Public Opinion Tribunal, composed of all the several individuals belonging to all the several States.'

<sup>1</sup> 'The Works of Jeremy Bentham,' published under the superintendence of his Executor John Bowring, t. x. p. 584.

Il signale également quelques points qui, selon lui, mériteraient d'être tranchés, tels que l'autorité de l'Etat sur les étrangers, l'exécution des jugements étrangers, la question de la prise de possession d'un territoire barbare ; les lignes qu'il consacre à chacun de ces sujets permettent d'admirer sa prodigieuse puissance d'analyse. La question de l'occupation est à l'ordre du jour. Voici en quels termes Bentham résumait, il y a plus d'un demi-siècle, ce qu'il y aurait à faire : 'Quantity and dimensions of territory as to which the right of possession or that of intercourse for trade or otherwise, shall be understood to be created by first visitation, by sea or by land, or subsequent visitation after an interval of universal non-visitation continued during a number of years, which for these purposes will require to be determined.'

Là s'arrêtent les notes manuscrites. Certes elles ont quelque chose de décousu, mais elles nous semblent néanmoins présenter un vif intérêt. Elles montrent l'opinion de Bentham sur plus d'un point du droit international et à ce titre déjà elles ont leur valeur. D'un autre côté, elles portent la marque du génie de leur auteur, et même inachevées, elles attestent la main d'un ouvrier habile entre tous.

ERNEST NYS.

## THE CIRCUITEERS.

## AN ECLOGUE.

SCENE—*The Banks of Windermere. Sunset.*ADDISON<sup>1</sup>. SIR GREGORY LEWIN<sup>2</sup>.

- A. How sweet, fair Windermere, thy waveless coast!  
 'Tis like a goodly issue well engrossed.
- L. How sweet this harmony of earth and sky!  
 'Tis like a well concerted *Alibi*.
- A. Pleas of the Crown are coarse and spoil one's tact,  
 Barren of fees and savouring of fact.
- L. Your pleas are cobwebs, narrower or wider,  
 That sometimes catch the fly, sometimes the spider.
- A. Come let us rest beside this prattling burn,  
 And sing of our respective trades in turn.
- L. Agreed! our song shall pierce the azure vault:  
 For Meade's<sup>3</sup> case proves, or my Report's in fault,  
 That singing can't be reckoned an assault.
- A. Who shall begin?
- L. That precious right, my friend,  
 I freely yield, nor care how late I end.
- A. Vast is the pleader's rapture, when he sees  
 The classical endorsement—'Please draw pleas.'
- L. Dear are the words—I ne'er can read them frigidly—  
 'We have no case, but cross-examine rigidly.'
- A. Blackhurst<sup>4</sup> is coy, but sometimes has been won  
 To scratch out 'Hoggins'<sup>5</sup> and write 'Addison.'
- L. Me Jackson<sup>6</sup> oft deludes; on me he rolls  
 Fiendlike his eye, then chucks his brief to Knowles<sup>7</sup>.
- A. What fears, what hopes through all my frame did shoot  
 When Frodsham's breeches, Gilbert, felt thy boot<sup>8</sup>!

<sup>1</sup> A special pleader.<sup>2</sup> A criminal lawyer and reporter of 'Lewin's Crown Cases.'<sup>3</sup> Meade and Belt's Case, 1 Lewin C. C. 184, per Holroyd J.: 'No words or singing are equivalent to an assault.'<sup>4</sup> An attorney of Preston.<sup>5</sup> Hoggins, a barrister on the Northern Circuit—afterwards a Queen's Counsel.<sup>6</sup> An attorney.<sup>7</sup> C. J. Knowles, on the Northern Circuit—afterwards a Q.C.<sup>8</sup> Frodsham, an attorney, was summarily ejected by Gilbert Henderson (Recorder of Liverpool) from his chambers, for some offensive words used by him during an arbitration. Afterwards Frodsham sued Henderson for damages for the assault. His counsel was Serjeant Cross. John Williams, afterwards a Judge of the Court of Queen's Bench, led

- L.* O! all ye jail-birds, 'twas a day of sulks  
When Roger Whitehead flitted to the hulks.
- A.* Thoughts much too deep for tears subdue the Court  
When I *assumpsit* bring, and god-like waive a tort.
- L.* When witnesses, like swarms of summer flies,  
I call to character, and none replies,  
Dark Attridge<sup>1</sup> gives a grunt, the gentle bailiff sighs.
- A.* A pleading fashioned of the moon's pale shine  
I love, that makes a youngster new-assign.
- L.* I love to put a farmer in a funk,  
Then make the galleries believe he's drunk.
- A.* Answer, and you my oracle shall be,  
How a sham differs from a real plea?
- L.* Tell me the difference first, 'tis thought immense,  
Betwixt a naked lie and false pretence.  
Now let us gifts exchange; a timely gift  
Is often found no despicable thrift.
- A.* Take these, well worthy of the Roxburghe Club,  
Eleven counts struck out in Gobble *versus* Grubb.
- L.* Let this within thy pigeon-holes be packed,  
A choice conviction on the Bum-boat Act<sup>2</sup>.
- A.* I give this penknife-case, since giving thrives;  
It holds ten knives, ten hafts, ten blades, ten other knives.
- L.* Take this bank-note (the gift won't be my ruin),  
'Twas forged by Dade and Kirkwood; see first Lewin<sup>3</sup>.
- A.* Change we the *Venue*, Knight; your tones bewitch,  
But too much pudding chokes, however rich,  
Enough's enough, and surplusage the rest.  
The sun no more *gives colour* to the West,  
And, one by one, the pleasure boats forsake  
Yon land with water covered, called a lake.  
'Tis supper time; the inn is somewhat far,  
Dense are the dews, though bright the evening star;  
And Wightman<sup>4</sup> might drop in and eat our char.

for the defence, and concluded his speech to the jury by saying, 'I vow to God, gentlemen, I should have done the same thing myself—an insult—a kick—and a farthing—all the world over!' The jury accordingly found for the plaintiff with one farthing damages. Cross tied up his papers and remarked, 'My client has got more kicks than halfpence.' But it was always a matter of doubt whether he knew that he was saying a good thing or not. He had never before said anything to provoke such a suspicion.

<sup>1</sup> Sir Gregory Lewin's clerk.

<sup>2</sup> 2 Geo. III. c. 28. 'An Act to prevent the committing of Thefts and Frauds by persons navigating Bum-boats and other boats upon the river Thames,' rep. 2 & 3 Vict. c. 47, s. 24.

<sup>3</sup> 1 Lewin C. C. 145.

<sup>4</sup> Afterwards a Judge of the Court of Queen's Bench.

These lines were written by John Leycester Adolphus, whose name is so well known as a reporter in conjunction first with Barnewall and afterwards for a much longer period with Ellis. He was appointed Judge of the Marylebone County Court in 1852. He was, beyond his law, a man of the finest literary accomplishment and taste, and wrote the 'Letters to Richard Heber, Esq., containing critical remarks on the Series of Novels beginning with Waverley, and an attempt to ascertain their Author.' This charming and ingenious little work was published in 1821, reached a second edition in 1822, and procured for its writer the friendship of Sir Walter Scott.

This eclogue formed part of the amusement provided after dinner in the festive Grand Court holden while the Northern Circuit was at Liverpool for the Summer Assizes in 1839.

The lines have already been printed, but many years ago, in *Notes and Queries*, 3rd Series, v. 5, p. 6 (2nd January, 1864). No apology can be needed for reproducing in these pages so choice a specimen of legal humour, parts of which may now almost serve as a sort of valedictory address to the defunct science of Special Pleading.

P. Q. R.

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## REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

*Moritz Voigt, Die XII Tafeln. Geschichte und System des Civil- und Criminalrechtes, wie Processes der XII Tafeln nebst deren Fragmenten.* Leipzig: Verlag von A. G. Liebeskind. 1883. 2 vols. 8vo. xii, 737 & x, 859 pp.

SIR HENRY MAINE has undoubtedly the great merit of having given a mighty impulse to the historical consideration and study of law. It is chiefly due to the most attractive sketch he had given of the development of legal institutions in the ancient periods of civilisation that questions of the early forms of conveyance, contract, and the like are frequently discussed in this country at the present time.

Under such circumstances, the work under consideration, which is the fruit of immense labour and which is founded on inquiries of the same author into the most intricate problems in Roman legal history, will meet with some sympathy in this country; the more so, as at least one of the works alluded to, 'Das jus naturale, æquum et bonum und jus gentium der Römer,' is to some extent known to English scholars and was recently called attention to<sup>1</sup>. It is an immense merit of this treatise that it has settled the difficult notion of jus gentium, which is no doubt of the utmost importance for a rational understanding of the historical development of Roman law.

There is no doubt that there existed in the earliest historical times a jus gentium in the sense of a public international law, i.e. a body of rules by which the intercourse of the Italic gentes with one another was determined; thus rules as to the treatment of ambassadors, the declaration of war, the conclusion of peace were recognised amongst these tribes. But Voigt has shown that jus gentium so far as it related to matters of private law had been gradually developed since the beginning of the sixth century after the foundation of the city, in consequence of the growing intercourse, and especially the frequent mercantile exchange, with other nations. To meet the necessities of the various relations of life thus arising, a corresponding body of rules imperceptibly grew up which in their origin are doubtless customary law. This so-called jus gentium formed in the course of time an extensive system of private law, which being recognised amongst all nations connected with the Roman Empire as a jus commune omnium liberorum hominum, or an *international* private law, stood in a remarkable opposition to the jus civile, as the jus proprium civium Romanorum or the law peculiar to the Roman *nationality*.

<sup>1</sup> See Professor Nettleship's Notes on Jus gentium in the Journal of Philology, vol. xiii. p. 169 seqq.



It is obvious that the notion of *jus gentium* in this sense is distinct from 'the sum of the common ingredients' of different laws which, probably being the elements and principles underlying the particular rules, would hardly form a system of definite rules: and it is also distinguished from a 'collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes'.<sup>1</sup> It seems to be impossible to assume that there are within the systems of law of different nations or tribes rules which are common to all of them and would form a uniform and complete system of law together, and if so, it would be impossible for any man or body of men to ascertain these rules.

On the other hand, Voigt's notion of *jus gentium* is also not in accordance with the view that *jus gentium* is 'in its origin a *jus naturae*, a philosophical ideal'.<sup>2</sup> It is true there are several passages which support such a conception, declaring the *jus gentium* to be a kind of primordial law which, being implanted by nature itself, is everywhere in the same way in force.<sup>3</sup> But these passages are easily explained by the assumption that the philosophers and jurists of the later times tried to account for the existence of the *jus gentium*. As they, on one side, were wholly ignorant of its origin and development, and on the other observed that this law was actually recognised by all nations known to them, and further that it was evidently more liberal and showed more consideration to the intention of the parties than the strict and formal civil law, they naturally explained it in the way mentioned and identified it with the *jus naturae*. The real nature of the *jus gentium* as a positive law, however, could not escape their attention, and being aware of this fact, they sometimes place it in strong opposition to the *jus naturae*, as, for example, in I. i. 2. § 2, I. i. 3. § 2, and I. i. 5 pr. The first passage is especially remarkable, in so far as it declares—in opposition to § 1 of the same title—the *jus gentium* to be the result of common intercourse and human necessities: '*nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt.*'

Extremely interesting as it would be to expand these views, it is necessary now to turn our attention to the work of Professor Voigt which we propose to consider. The leading view followed by the author in expounding the law of the Twelve Tables is, that the present state of science in general, and of archaeology in particular, requires more than a simple account of the materials contained in the sources themselves. He thinks that we require an exposition of the whole system of early law, showing the connexion of the several portions with each other. And having an unrivalled command of all the sources which in any way bear upon the topic he is dealing with, the author is able to give an account of the early civil and criminal law and the law of procedure, fuller and more extensive than we should have expected even from a scholar so well acquainted with the legal history of Rome.

<sup>1</sup> See Sir Henry Maine, *Ancient Law*, pp. 49, 50.

<sup>2</sup> Professor E. C. Clark, *Practical Jurisprudence*, p. 358.

<sup>3</sup> Cf. e.g. Gaius, i. 1, Inst. i. 2. §§ 1, 11.

The first volume is intended to lay the foundation for the second, and is divided into a *Historical part* and a *general Juristic part*.

In the historical part the origin, motives, and tendencies of the decemviral legislation are set forth, together with its relations to the Hellenic laws. Then the social and economical conditions as well as the nature of the character of the Roman people in the beginning of the fourth century A. U. C. are discussed as forming the natural foundation for the legislative work of the period. Lastly, the author deals with the Code itself, considering the nature of the law of the Twelve Tables and their provisions, the arrangement of the several enactments and their traditional history, the commentaries written upon the Twelve Tables, and the attempts which have been made to reconstruct their original text.

The general part begins, in its first chapter, with a consideration of the nature and inter-relation of the different rules which governed the conduct of men in those ancient days, i. e. *fas*, *jus*, and *boni mores*.

Chapter II discusses the very important notion of *actio* which is with Voigt a solemn legal act (including both juristic act and legal remedy), which as a rule required—1. certain solemn words, *verba*; 2. certain movements of the body as symbolic explanation of the intention of the person acting, *actus*; 3. presence of certain persons as witnesses to the act, *testatio*.

Chapters III and IV are devoted to the notion of Persons, the capacity for rights and duties and such conditions of men as are legally important, as *infantia*, *impubertas*, &c.

The following Chapters (V, VI, VII) deal with the notion of legal rights and duties, with the acquisition and loss of rights as well as their violation.

The consideration of the violation of rights naturally leads to that of the remedies provided against it, and so to the discussion of the principles of self-help and procedure (Ch. VIII and IX), which are followed by an explanation of the Civil procedure in Chapter X and the Criminal procedure in Chapter XI.

The Appendix (pp. 691-737) contains the fragments of the Twelve Tables in a new arrangement, conveniently combined with perpetual references to other testimonies in our sources as well as those passages in Voigt's book by which the matter in question is explained.

The second volume contains the system of the Civil, i. e. private law (pp. 1-777) and Criminal law (pp. 779-845) of the Twelve Tables.

The exposition of the Civil law is subdivided into three parts, dealing with *jura in rem* (*dingliche Rechte*), obligatory rights (*Forderungsrechte*), and rights over other persons (which are not *jura in rem*).

1. According to Voigt, the notion of the '*dingliche Recht*' (Ch. I) is in reference to those early times to be taken in a very wide sense, comprehending every right protected by a *vindicatio*, and accordingly having for its object not only the *manus*, i. e. the power over the members and the property of the family, but also the *libertas* itself, the *hereditas*, and the *tutela* (Chapters II-V).

2. The second subdivision deals in the first chapter with Obliga-

tions in general, discussing their nature and requisites, their origin, extinction, and effects, whilst Chapter II explains the single obligations under the usual headings of contract, quasi-contract, delict and quasi-delict.

3. The personal rights over other persons are treated in four chapters, explaining the relation of patron and clients, of husband and wife (as far as *manus* is not concerned), the *cura prodigi* and *furiosi*, and the relations between a corporation and its members.

Any attempt to give an idea of the comprehensive character of this work would require far more space than can be devoted to the purpose in this review. We may however be permitted to show in a single instance how greatly our knowledge of the ancient institutions of Rome may be advanced by the researches of Professor Voigt, and for this object we propose to give a short sketch of the system of contracts of the Twelve Tables as stated by him.

It has been repeatedly pointed out that there was comparatively little room for contract in the early law. This naturally results from the condition of a people whose chief occupation is agriculture, and whose necessities are provided for by the labour of single families, the members of which work for the family benefit. Under such circumstances, it is mainly the exchange of the necessities of life which now and then becomes unavoidable. Although such transactions were sometimes necessary, it is yet a peculiar characteristic of ancient law that no legal force was attached to the agreement itself (for instance the agreement to exchange), but to the transaction which followed the agreement and was intended to carry it into effect; accordingly in the Twelve Tables, not the agreement to sell a certain thing, but the subsequent transfer of it for the price agreed on—*mancipatio*—had legal effect.

Nevertheless, we must not suppose that obligations and contracts were altogether unknown to the law. The only peculiarity was that contracts had for the most part no independent form of their own. It is well known that in the case of *mancipatio* the parties could make additional declarations which formed part of the so-called *nuncupatio*, which in itself was a portion of the act of transfer, i.e. the *mancipatio*. Thus, by a so-called *lex mancipii* the *mancipio datus* could warrant a certain quantity or quality of the thing transferred, and the *mancipio accipiens* could similarly promise to do something with the thing received by him, for instance, to manumit the slave *mancipatus*. It follows that by the *lex mancipii* similar objects could be secured, as in later times by the *pacta adjecta*, which also formed a portion of another transaction (*contractus bonae fidei*) and derived from it their binding force.

Of greater importance seems to have been the *contractus fiduciarius*. By *mancipatio sub fiducia* (viz. *remancipationis*) only temporary ownership was granted in a thing, and thus different objects could be attained which only several hundred years later could take legal effect as *contractus*. It was only necessary to formulate the *fiducia* according to the object intended by the parties, i.e. to promise to re-transfer ownership either when the time came at

which the transferor should claim it back (*depositum*), or if the use agreed on had been made of it by the transferee (*commodatum*), or as soon as the money lent had been paid back (*pignus*). Even a loan of money could be made in the form of *mancipatio*, for in the case of the *mancipatio cum creditore* the sum of money given by the *mancipio accipiens*, i. e. the creditor, was in point of form the *pretium mancipationis*, paid for the thing mancipated (i. e. in reality the pledge). It is obvious that other agreements also could be made actionable in this way, provided a temporary transfer of a thing was contemplated by the parties, e. g. a *mandatum*: if for instance a person going abroad intended to leave his property with a friend to be administered by him gratuitously, such intention could be made legally effective by *mancipatio sub fiducia*.

Thus in the form of the ancient conveyance the different objects aimed at by the *contractus re*, and, to some extent, also those of consensual contracts, could take legal effect<sup>1</sup>. There were however in the Twelve Tables several contracts recognised which have a form of their own. One of these was the *nexum*, which was a loan for consumption of money (*aes*) or other ponderable things. Professor Voigt has in our opinion convincingly shown that the term '*nexum*' in its original sense is by no means identical with every transaction *per aes et libram*<sup>2</sup>, and that it was not till the later times of the republic that the term *nexum* was used as synonymous with '*omne quod geritur per aes et libram*.' In the ancient law it was common to the transfer by *mancipatio* and to the contract of *nexum* (or *nexi datio*) and its dissolution by the so-called *nexi solutio*, that they were formally to be executed '*per libram*' (in the earlier times the use of metal as money was unknown, and on that account the form '*per aes et libram*' is not the most ancient one).

A second contract with a special form of its own is—according to Voigt—the *dotis dictio*. It consisted in a solemn declaration (*dotem tibi dico*) by which something was promised as a dower to the (present or future) husband either by the wife or bride, or if she was under paternal power by her father; a promise which however did not require a formal acceptance on the part of the person addressed.

In addition to this there was already in the law of the Twelve Tables a kind of contract, the so-called *vadimonium*, which had the functions of suretyship in the later law. It was peculiar to this institution that the *vas* promised something which another person was bound to do, and in case the latter should not comply with his duty, the *vas* promised to pay a penalty. Thus *vadimonium*

<sup>1</sup> Sir H. Maine in his *Ancient Law* does not seem to be aware of this possibility (chapter ix, especially p. 332).

<sup>2</sup> This is commonly assumed; cf. e. g. Sir H. Maine, *Ancient Law*, p. 315. [In justice to Sir H. Maine, it must be remembered that '*Ancient Law*' was published nearly twenty-five years ago, and that readers of later editions are expressly warned by the author that they do not profess to be substantially more than reprints. The derivation of the *Stipulation* from the *Nexum* is now considered untenable by the best authorities; but if it is still taught to students as an unquestioned fact on Sir H. Maine's authority, that is the fault not of Sir H. Maine but of the teachers.—ED.]

differed from fidejussio, for the *vas* did not become privy to an existing obligation, but contracted an obligation of his own.

One objection may be made to Professor Voigt's method. He has undoubtedly an extraordinary power of juristic construction, and his full command of the authorities relating to his subject sometimes tempts him to carry his construction farther than the positive evidence seems to warrant. But his work has the great merit of putting before the eyes of the reader definite results which form by their connection with each other one uniform system. It must further be admitted that his assumptions are always plausible, and such as would suggest themselves to one well acquainted with the economical and social conditions of the time.

Under these circumstances, we look forward with much interest to another publication promised by the same author; namely a history of the Roman law. We may fairly expect that we shall in this work be presented with a clear, uniform and comprehensive survey of the gradual development of the Roman law.

ERWIN GRUEBER.

*Essays on some disputed Questions in Modern International Law.* By J. T. LAWRENCE, M.A., LL.M. Cambridge: Deighton, Bell & Co. 8vo. 259 pp.

THE lectures collected and in some cases amplified for publication by Mr. Lawrence, the deputy Whewell Professor of International Law, contain much useful information and the expression of interesting opinions on some special questions of practical importance, particularly those which are connected with the Suez Canal and with the interpretation of the Clayton-Bulwer treaty. But Mr. Lawrence's book will be here considered, and the author himself would perhaps wish it to be considered, as presenting a theoretical or general view of the life which the nations of Europe live side by side, and of the laws to which such international life is subject. Writers on international law continue to express different opinions as to the theoretical nature of the topics which it is their object to discuss without forfeiting either scientific accuracy and symmetry or practical utility. We may conclude that the true theoretical view is not yet established beyond reasonable doubt: and there is no better method of discovering it than that employed by Mr. Lawrence. He does not, like some writers, indulge in *a priori* speculations as to the nature of things in general, and then dogmatically assert the part which nations must play in the universe, without so much as inquiring what nations the universe contains nor how they are given to behave: but he looks at the actual nations which exist, recalls their past, criticises their present, and tries to conjecture their future behaviour; and then, eliminating what is accidental and explaining what is apparently inconsistent, arrives at the essential characteristics of international relations, and disentangles the theory by which any particular group of diplomatic or bellicose incidents may be properly comprehended and classified.

A book which consists of a collection of lectures given on separate occasions cannot well constitute a complete and systematic exposition of a theory; but any reader of these essays will be able to follow the thread of theoretical reasoning easily enough, especially as there are some sign-posts set up in the Preface in order to help him to do so.

Let us turn our eyes then with Mr. Lawrence towards the group of civilised nations living on their adjacent territories or facing one another from the opposite sides of seas or straits, busy each with its own political developments and administrative organisation, or with schemes of colonial enterprise; entering at the same time into commercial relations with one another, in which some strive to increase their own prosperity at the expense of that of other nations, while some think they will gain most by aiming at the greatest prosperity of the greatest number of nations; entering into alliances one with another, compromising difficult questions, referring disputes to arbitration; and every now and then striking fierce blows at one another with all the resources of civilisation which they can command, each nation killing the members of its neighbour and sacrificing many of its own, destroying valuable property, and incurring or causing its opponent to incur great expenses which must be met by increased taxation and a consequent diminution in the comfort and well-being of taxpayers. The first question which Mr. Lawrence asks with a view to the establishment of a theory is whether these nations are subject to law. Some writers have said that they are not: and Mr. Lawrence seems to think that the speculations of such writers 'are directed to lessen the estimation in which' the body of learning invariably spoken of as international law 'is held.' It is perhaps to be regretted that Mr. Lawrence attributes this dangerous design to those who differ from him. By doing so he imports something like prejudice into the discussion: and the last paragraph of his first lecture, in which he claims 'to have rehabilitated International Law' and to have 'pointed out its right to the title of law,' makes us doubt for a moment whether Mr. Lawrence has not been tempted to look on International Law as a client to be defended from libellous aspersions, and so been led away from that impartial frame of mind which becomes the scientific investigator. However, we may suppose that Mr. Lawrence's conclusions would have been the same even if he had not suspected his opponents of any personal ill-will towards an important branch of human learning: and this conclusion is that the conduct of nations towards one another is subject to principles which are properly described as laws. The element of force is not, according to Mr. Lawrence, a necessary element in a law. It is in fact an important element in the laws which have governed individuals at certain stages of human development: but a law may exist and govern the conduct of individuals though there be no force to support it, no sovereign body to wield such force, and no sanction to be inflicted on the law-breaker or utilised as a threat against the ill-disposed. The ideas we must readily associate

with the word law are only incidentally connected with the thing. If there was a nation without a legislature, a statute book, a judicial Bench, or a High Court of Justice, without a single police magistrate or a single prison; a nation without a Central Office, a County Court Judge, or a Chief Clerk, such a nation might yet consist of individuals subject to law. For there might have been among the individuals composing the nation so much discussion on legal questions, leading to such a clear-sighted apprehension of the great principles relating to human conduct, such a disposition to conform to those principles, and such candour and ingenuity in discerning their application to particular difficulties, that legal machinery would be superfluous. The Community of Nations has not indeed quite reached this ideal condition; but if nations are not absolutely certain to perceive the applications of International Law, nor yet to bow to its dictates when they appear to conflict with their interests and ambitions, it must be remembered, on the other hand, that they are not quite devoid of the ordinary legal machinery. Adding together the international legal machinery which actually exists, and the readiness of the nations now flourishing to apprehend and to follow certain principles affecting their relations with one another, Mr. Lawrence finds enough to justify the opinion that nations are subject to law.

The statement that nations are subject to law is of course not to be supposed to mean that the law is never broken or even that it is always formulated. Principles applicable to international relations exist; and nations are so happily constituted that they can formulate and follow these principles for themselves without the aid of sovereign bodies, effective sanctions, and the other incidental characteristics of the laws applying to individuals, to which Austin, unnecessarily according to Mr. Lawrence, attaches such great importance. Before the law governing nations is completely established, there must be a good deal of civilisation; at intermediate stages there will be incomplete law gradually developing; and at the dawn of civilisation there is no law at all, but only principles and an undeveloped capacity for their perception and for adherence to them. Mr. Lawrence deals with the period of international lawlessness and with the gradual transition therefrom to the earlier stages of law in his essay on Grotius. The nations of Europe had not advanced very far towards the recognition and acceptance of international law before the time of Grotius. Such law as they had depended on the superiority exercised by Popes and Emperors over the European States; and with the disappearance of such superiority international lawlessness became imminent. Grotius staved off this danger, and gave international principles a much better chance than they had yet had of becoming laws by the publication of his work, *De Jure Belli ac Pacis*. He was wrong in his view of the law of nature, and wrong in his conception of the applicability of pure Roman law to international relations. These errors are pointed out by Mr. Lawrence; but he maintains that Grotius did a great work by giving a systematic and intelligible account of the principles really governing international life. The theory of

Grotius, which was generally accepted with some variations, answered far better than the theory of the Empire or of the Papacy. Statesmen acknowledged and partly conformed to the great eternal principles, and international lawlessness was definitely and unmistakably replaced by international law, which has never since Grotius's time been in any danger of disappearance. The improvement in practical warfare between the Thirty Years' War and the War of Spanish Succession is the example of this change most insisted on by Mr. Lawrence. One of Grotius's fundamental theories was the equality of nations; but this theory does not suit with modern facts, and the essay on the 'Primacy of the Great Powers' shows us how the nature of international law is affected by undoubted facts as to the relative importance of the actually existing States.

The last essay in the book deals with 'The Evolution of Peace.' When we have ascertained the true nature of nations, of the laws which govern them, of the different kinds into which they are divided, and of the way in which they have behaved or are likely to behave, we could certainly make no more valuable use of our scientific knowledge than by solving the question whether or not they are likely to go on fighting with one another. Mr. Lawrence solves this question in the negative. He shows that the complete disappearance of war would be a change like some of the changes which have taken place in past times, or another step in a process of evolution which has already made great advances. The point is an important one to Mr. Lawrence's general theory, because the disposition of nations to give up war is a part of that almost superhuman virtue which enables nations to enjoy law without the petty incidental devices whose importance is so unduly emphasised by Austin. It is therefore perhaps worth while to refer very shortly to some of the facts which Mr. Lawrence's faith in Evolution enables him to regard as consistent with his theory.

An estimate made in 1860<sup>1</sup> of the wars of Great Britain and of the Continental States of Europe between the end of the Great War and the year 1860 gives some results not exactly illustrative of the Evolution of Peace. There was not one year from 1815 to 1860 during which England was not either actually at war or engaged in some dispute likely to end in war. There are many years during that period when England was carrying on two wars in different parts of the world. She was at war (either as a belligerent in the strict sense, or as engaged in hostile operations only technically distinguishable from war) with Turkey in 1828, with Holland in 1832, with Russia from 1854 to 1856, and for several years with China. Desperate wars with the Burmese, the Afghans, the Sikhs, and the Caffres occupied her arms almost continuously through many 'peaceful' years<sup>2</sup>. Meanwhile

<sup>1</sup> See a Table given at pp. 63-72 of 'Essays in Political and Moral Philosophy' by T. E. Cliffe Leslie. 1879.

<sup>2</sup> [It might fairly be replied that such wars, however desperate, have a somewhat remote bearing on the question whether the relations between civilized Occidental



there was not a year without a long list of hostilities and warfare on the Continent. Since 1860 there have been great wars in almost every part of the Continent of Europe, and a great war on the other side of the Atlantic. The nature of these wars leads most people to consider that the last twenty years have witnessed a revival of war. In fact it is only because of the terrible character of the wars which have accompanied the consolidation of the German and accelerated the decay of the Ottoman Empire that we are accustomed to think of the preceding era as one of peace. Nowars in history tend more than recent wars to support the theory that war is not merely the outcome of international disputes or the sanction of international morality, but rather the natural accompaniment of national progress and development. If our own country has kept clear of European wars since the time of the Crimea, it has nevertheless, in the opinion of good judges, been very near to taking part in them on more than one occasion, and the 'little wars' of England have certainly not diminished in number or importance within the last twenty years; and at this very moment warlike preparations are being made and large reinforcements despatched to a stubborn and arduous contest amidst unmistakable manifestations of popular sentiments which, to say the least, do not constitute a guarantee of the successful Evolution of Peace.

J. K. STEPHEN.

*A Digest of the Reported Decisions of the Courts of Common Law, Bankruptcy, Probate, Admiralty, and Divorce. Founded on Fisher's Digest.* By JOHN MEWS, assisted by C. M. CHAPMAN, HARRY H. W. SPARHAM, and A. TODD. In Seven Volumes. H. Sweet; Stevens & Sons; Maxwell & Son.

ALL practising lawyers must have already very often used this Digest since it was published, and have made up their minds respecting its merits; and any reference to them now comes very late. Like so much other good work in law and elsewhere, this Digest has been built up slowly and by many hands. It is based on Fisher's Digest, which was based on Harrison's. The latter was preceded by a long line of works of the same kind—for example, by Viner's Abridgment in 1746, and Chief Baron Comyns' in 1762. Harrison's was in some respects—not in all, for Comyns' work, so great a favourite with the late Mr. Justice Willes, had excellent points of its own—an improvement upon anything which preceded it. Fisher's, published in 1870, marked a distinct advance; and Mr. Mews and those who have assisted him have introduced several improvements. I have used the new edition almost daily;

powers tend on the whole to become more peaceful. So as to insurrections. But we so far agree with the writer of the article as to hold that the peace of nations comes by the strong man armed, and not by amiable talk about universal arbitration.—Ed.]

and it seems to me that it is in many ways far better than its predecessor—more nearly complete, more accurate, and more skilfully arranged. The few inaccuracies which I have noted are unimportant; they are chiefly either misprints of figures, or they arise from the editors' trusting a little too implicitly to head-notes. It is a truism to say that no practising lawyer can well dispense with these volumes; and lawyers in other countries may well envy the possession of such admirable tools<sup>1</sup>. What a pathless jungle the Common Law would be but for the fact that it is here faithfully mapped out!

Not that the book is perfect. Some years hence Mr. Mews will no doubt give a still better edition. Since the so-called 'fusion' of Law and Equity, the reason for the existence of separate Digests of Common Law and Equity is gone. Yet these volumes contain only a 'selection' of the cases decided in the Court of Chancery, and exclude the entire subject of administration actions. This produces, I have found, inconvenience. Suppose, for instance, that a point in Bankruptcy Law is under investigation. Reports of cases on Appeal may be found in some of the sets of Chancery reports, which may not be within the purview of this Digest. Why not fuse the two Digests, even if it be necessary to exclude many old cases cited in these volumes? The editors have not gone further back than 1756, the year when Lord Mansfield became Lord Chief Justice of the King's Bench. This, of course, excludes a few reports—the Reports, the Modern Reports, and Croke's, for instance—which are still occasionally cited. But, except to the antiquarian or student of legal history, reports of an earlier date than 1756 possess little interest. Nothing in the recent history of law is more remarkable than the disrepute into which, in the eyes of most members of the Bench, old Common Law decisions have fallen. It is very often worse than useless to cite them. A judge has been known to dismiss contemptuously as 'a bundle of old umbrellas' fine old rating cases from Manning and Granger and Meeson and Welsby, abounding in nice distinctions; and a decision of 1876 has been half seriously referred to from the Bench as 'ancient law.' Arguments such as the late Mr. Justice Willes, when at the Bar, elaborated—skilfully constructed mosaics of all the existing authorities, curiously dovetailing all relevant cases so that the Year Books were harmonised with Meeson and Welsby—have become rare, if not well nigh impossible. In regard to old authorities there does not exist the curiosity or, I may add, the respect which made it once possible for Courts to believe that they could not but be profitably spending the public time in laboriously examining all the cases. Only in fiction is the modern English Judge the slave of precedent; the lawyer who has to 'advise,' or who writes 'opinions,' finds that he is very much the reverse. I would venture to suggest one or two other points to which

<sup>1</sup> These volumes are, it seems to me, incomparably better planned than Abbott's *National Digest of American Decisions*, Shaw's *Digest of Cases Decided in the Supreme Courts of Scotland*, or Dalloz's *Jurisprudence Générale*.

future editors may do well to give their attention. Some one projected 'a harmony of the reports' on the plan of a class of works well known in theology. Everyone is aware that in the older reports cases are scattered about in an embarrassing manner. To mention one striking example known to every reader of Smith's *Leading Cases*, the *disjecta membra* of *Manby v. Scott* are found in a dozen places, the head here, a limb there; the argument of Sir Orlando Bridgman in *Bridgman's Judgments*; the decision of Hyde J. in *Modern Reports*; that of Hale C.B. in *Bacon's Abridgment*. Probably it would not be worth while to note in the Digest slight differences between the various versions of the same decision. But where the differences are serious—where, as often happens, one report is at issue with another in regard to the only point for which the case is an authority—it would be well to insert in the Digest a caveat. It would, too, be an advantage, fully compensating for the great labour necessary, to append to the cases their dates. Authorities which sound meaningless can often be made to speak good sense when their exact position in time is known.

The editors have very properly, it seems to me, omitted the summaries of Statutes which appeared in Fisher's Digest. They were of little use. Nothing short of the exact words of a Statute satisfies a lawyer; and Chitty's Statutes, as edited by Mr. Lely, answer fully all usual requirements. Another excusable omission is the exclusion of lists of over-ruled and 'impeached' cases. To prepare such a catalogue as would be of any real value would involve labour and responsibility from which the editors might be pardoned for shrinking.

JOHN MACDONELL.

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*The Law and Practice of the Courts of the United Kingdom relating to Foreign Judgments and Parties out of the Jurisdiction, to which are added chapters on the Laws of the British Colonies, European and Asiatic Nations, and the States and Republics of America.* By FRANCIS T. PIGGOTT. Second Edition, revised and enlarged. London: Wm. Clowes & Sons, Limited, 1884. Large 8vo., xlvii and 626 pp.

MR. PIGGOTT tells us that 'a first edition can scarcely pretend to be more than a sketch of any subject; in the second the author may hope to arrive at more perfect and finished work.'

The truth of this principle is open to question, and Mr. Piggott's own performance confutes his doctrine. His early book on Judgments was a better book than this his second edition, and this for the very sufficient reason that it was considerably shorter. But even Mr. Piggott's original book was a work of no great merit, and now that it shows a tendency to increase in size, and we must therefore suppose in circulation, the time has come for explaining in as few and simple words as may be the reasons for holding that

Mr. Piggott is one of those writers who confuse size with greatness and produce books which discredit the very name of a jurist.

Mr. Piggott is a theorist and jurist or he is nothing. His work attempts to deal in a philosophical manner with some of the most difficult portions of that admittedly thorny topic—the (so-called) conflict of laws, and the primary question to be considered is whether our author shows any capacity for legal speculation.

There is no fairer way of testing Mr. Piggott's workmanship than to examine his fundamental doctrine in reference to foreign judgments. He tells us with more or less truth that two theories have been propounded as to the grounds on which English Courts enforce foreign judgments. The one he terms 'the doctrine of comity,' the other the 'doctrine of obligation.' The first of these doctrines is in substance that English tribunals are bound by the comity of nations to enforce the decisions of foreign Courts; the second of these doctrines is that the judgments of foreign Courts are enforced in England because there is a legal duty or obligation on the foreign debtor to obey them. Mr. Piggott is dissatisfied with each of these doctrines, and propounds the great dogma that foreign judgments are enforced in England out of combined considerations of comity and of obligation. His grand proposition is thus stated:—

*'There is a legal obligation existing against the debtor in the State where the judgment has been pronounced; the obligation has been disobeyed. By reason of the debtor's absence from the jurisdiction of its Courts, and there being no property on which execution can issue, the State is unable to enforce the sanction.'*

*'By virtue of the Comity of Nations, a foreign State, to which the debtor has gone, will clothe the obligation deprived of its correlative sanction, with another sanction auxiliary to it: and by so doing will endue it with the power resembling that which it has lost.'*

*'This I have called the doctrine of OBLIGATION AND COMITY.'*

We have stated the doctrine of obligation and comity in Mr. Piggott's own words lest we should be accused of misrepresenting his theory. It is on the face of it open to three objections. The first objection is, that the dogma, whether true or false, whether full of import or meaningless, has no special reference to judgments, but applies (if at all) to all cases in which English Courts recognise rights acquired under foreign law. The motive for such recognition may be comity, justice, expediency, convenience, moral obligation, or anything you like. But whatever be the motive for recognising a right acquired by *A* against *X* in France under a contract made and to be performed in Paris, that motive and no other is the motive for recognising a right acquired by *A* against *X* under the judgment of a French Court, e.g. that *A* is entitled to recover his debt from *X*. The second objection is that the investigation into the motives which lead an English or any other tribunal to recognise and enforce rights duly acquired under the laws of a foreign country leads us hardly a step towards solving the problems connected with the conflict of laws. English Courts in many cases do and in some few cases do not treat as valid rights acquired under contracts

made in foreign countries. This fact is in no way explained by saying that the Courts recognise contracts on principles of good-will or because a promisor is under an obligation to perform his promise. The third reason is that Mr. Piggott's futile doctrine, which explains nothing, diverts attention from the true problem which needs solution. It is admitted that English Courts give effect (in general) to judgments pronounced by foreign tribunals of competent jurisdiction, i. e. by Courts which, according to the view of English Judges, have a right to pronounce a decision on a given matter. The problem (and it is by no means an easy one) which needs a solution is what are the principles on which English Judges decide whether a foreign court has or has not the right to pronounce judgment on a given matter. On this topic Mr. Piggott's dogma throws no light whatever. That he occasionally comes near the true question to be debated is probable. It is hardly possible that his huge treatise should do nothing whatever towards elucidating the one really perplexing point in the law as to foreign judgments. But Mr. Piggott with all his pretensions has not, as far as we see, either met or solved the true difficulty of his subject. The principles which lie at the bottom of the treatment due to foreign judgments and of the more general topic of which foreign judgments form a part, namely the theory of jurisdiction, will be solved only by a thinker who bears carefully in mind two indisputable facts: first, that what English Courts recognise is not in strictness a foreign judgment, but rights acquired under foreign judgments; and secondly, that the rules of so-called private international law are based on the recognition of actually acquired rights, i. e. of rights which when acquired could be really enforced by the sovereign of the State where they have their origin.

A. V. D.

*A Draft Code for Victoria.* (A Bill to declare, consolidate and amend the Substantive General Law. Brought in by the Hon. W. E. HEARN.) Melbourne, November 1884. 250 pp.

THIS is the first part of a serious attempt to codify the common law, notable for an entirely new scheme of arrangement. Of this scheme we are unable to approve, for the short reason that it breaks up familiar heads of the law, and confounds familiar divisions, without any cause which we can perceive to be adequate. So far as it is before us, the proposed Code purports to deal with the Duties of the People. The Rights of the People are to follow. Now this primary division appears to us a fallacious one. All rights imply corresponding duties; most duties imply corresponding rights. According to the dichotomy of this Draft Code, the Duties of the People are mainly to abstain from public offences and private wrong-doing. The law of Property and Contract seems to stand over for the title of Rights. We had thought it was no less a man's duty to perform his contracts than to forbear from trespasses; and

that, on the other hand, the right to be free from trespasses was in one sense more absolute than the right to have a contract performed, for one cannot be a citizen at all without having the former, while the latter does not exist until a valid contract has been made. Then the heresy of mixing up Public with Private Law is adopted and worked out in the most systematic fashion. It is well meant, and there is much honest work in it; but we hope the legislature of Victoria will think more than once or twice before enacting this elaborately revolutionary substitute for the Common Law.

Perhaps the best part is the preliminary chapter of Interpretation. But from this commendation we must except a series of 'Maxims of the Law,' whereof some appear to us doubtful or more than doubtful, others superfluous, and others too widely expressed. 'Neither Her Majesty nor any person shall have any other power than that which the law allows to her or to him:' either a truism or a sadly meagre Bill of Rights. 'No person shall change his purpose in such a manner and in such circumstances as to interfere with the legal right of any other person.' If I once interfere with your legal right, what does my purpose or the change of it matter? The marginal note guides us to some fantastic variations on the doctrine of 'part performance' by Malins V.C. (founded on an earlier decision of Sir John Stuart's now expressly overruled by the House of Lords), which had better have remained unreported<sup>1</sup>. 'In the assertion of their rights parties shall use reasonable diligence'—shall they so? What offence then is committed if they do not? A general duty of asserting one's rights is a 'fond thing.'

Detailed criticism on the execution of an undertaking of this scale will hardly be expected, especially when we cannot accept its outlines. But we think we have noticed in divers places the same fault that appears in parts of the Indian Codes, the too ready acceptance of the current version of this or that rule, when the rule itself is already outgrowing that version and seeking a new and better expression. And we regret that Mr. Hearn has adopted the unhappy Austinian triad of 'negligence, heedlessness, or rashness.' Austin's treatment of Negligence is the very worst part of his work.

*The Law of Contracts.* By J. W. SMITH. Eighth Edition, by VINCENT T. THOMPSON. London: Stevens & Sons, 1884. 8vo. 625 pp.

'In bringing this edition of Smith's lectures on the law of contracts up to the existing state of the law,' writes Mr. Thompson, 'the present editor has endeavoured to make his own additions as short as possible, confining them to cases of real importance and to such alterations as were rendered necessary by recent legislation. The editor trusts that the present edition will be found no less acceptable than its predecessors.'

<sup>1</sup> *Coles v. Pilkington*, 19 Eq. 174, 178, relying on *Lofus v. Maw*, 3 Giff. 592, 603, which is not law: *Maddison v. Alderson*, 8 App. Ca. 467, 473, 483.

Mr. Thompson, we assume, has fully discharged his editorial duties; and we can easily believe that his book will have a good sale. But for all this we assert with confidence that the republication at this time of day of 'Smith's Law of Contracts' is a gross mistake, and betrays a complete misconception on Mr. Thompson's part of the circumstances under which an educational work of authority can be republished and re-edited with real advantage. The error into which he has fallen is so common that it needs exposure.

The assumption which underlies the constant attempts made to bring editions of authoritative works 'up to the existing state of the law' is, in substance, that a book which had real worth say forty or fifty years ago is necessarily of worth now, and only needs a little re-editing to meet the requirements of the present day. A knowledge of 'Smith's Law of Contracts' is sufficient to show the baselessness of this supposition. Of Mr. Smith's lectures every student who was called to the Bar twenty years ago ought to speak with unfeigned respect. The book had special merits, both because it was the composition of J. W. Smith and because it was the result of oral exposition. Mr. Smith was one of the best lawyers of the old school; his views of law were based on the forms and rules of pleading, and his book exhibits all the merits and defects which naturally flow from the habit of regarding legal questions from a pleader's point of view. The happy accident that his explanation of the law took the form of lectures gave to his style a simplicity and clearness not often found in legal treatises. His 'Law of Contracts' was in short a far better manual than any other current when Mr. Smith published his first edition. But it is no discredit to Mr. Smith to say that lectures delivered in 1842 could not be anything like the lectures which a man of Mr. Smith's ability would deliver in 1884. There has been a revolution within the last forty years in the method of legal speculation. Savigny's writings, Austin's lectures, the Indian Codes, works such as Mr. Leake's, have changed our whole way of looking at the nature of a contract. If Mr. J. W. Smith were now alive he would himself be the first to re-write his book from beginning to end; he would perceive that to describe the nature of a contract is a totally different thing from classifying contracts, and that the received classification on which he relies, while it has nothing to do with definition, is as futile as any form of division ever laid before students. To classify agreements as contracts of record, contracts under seal, and contracts neither of record nor under seal, is in the sphere of law almost as silly as it would be in the sphere of physical science for a naturalist to classify animals under the heads of rhinoceroses, lions, and animals which are neither rhinoceroses nor lions. Mr. Smith would again most undoubtedly perceive that his whole treatment of the topic of Consideration was as confused and unintelligible as is possible to a teacher who really knows (as Mr. Smith of course did) the subject of which he is treating. He involves himself and his readers in a maze of pleader's technicalities and fictions, and,

if he perceives himself, certainly never made any student perceive that the broad rule of English law is that no gratuitous promise unless it is under seal is valid, and that the technical rule that 'a past consideration does not support a promise' is an inevitable deduction from the invalidity of gratuitous promises. As for his statement of the supposed exceptions to the doctrine that an executed consideration does not support a promise, we can only say that he has himself fallen a victim to his knowledge of pleading and to his ignorance of the true analysis of a contract. Of his exceptional cases two are not exceptions at all, and the other two can with difficulty be supported by the authorities. Mr. Smith could no more have written his treatise under the present condition of legal knowledge than Hume could have composed his *History* under the present condition of historical knowledge. To assert this does not involve denying either that J. W. Smith was a great lawyer or that Hume had some of the qualities of a great historian, but it does involve a protest against the noxious attempt to make Mr. Smith's book pass as a fit manual for modern readers. It needs not to be re-edited but to be rewritten, and such rewriting would simply be the publication of a new manual of the law of contracts at a time when such a manual is superfluous. Mere students find all they want in Anson's *Law of Contract*; lawyers find a mass of sound law combined with perfect clearness of exposition in the pages of Mr. Leake. If Mr. Thompson wishes to be of use to the present generation of students he can serve them in two ways. He can cease to bring out new editions of 'Smith's *Law of Contracts*,' and he may obtain Mr. Leake's permission to publish an abridgment of Mr. Leake's *Elementary Digest*.

A. V. D.

*The Law of Collisions at Sea.* By REGINALD G. MARSDEN. Second Edition. London: Stevens & Sons. 1885. 8vo. (about) 500 pp.

WE are enabled by the courtesy of the author to give the following account of the changes and new matter contained in this forthcoming edition.

'The second edition of the "*Law of Collisions*" incorporates the numerous decisions of English and American Courts as to the construction and application of the Regulations for Preventing Collisions at Sea, and touching the rights and liabilities arising out of collision, which have been reported during the past five years. The first chapter (of the first edition) is split up, and is now represented by Chapters I, II, III, V, and X. The subjects of these new chapters are, Negligence, Statutory Presumption of Fault, Liability, Division of Loss, and Incidental Rights and Liabilities arising out of collision. Limitation of Liability, formerly treated incidentally in connection with the measure of damages, now forms a chapter (Ch. VI.) by itself.

'The chapter upon the rule as to Division of Loss contains some new matter of historical (and possibly forensic) interest.



Whilst seeking in the records of the Admiralty for early authorities as to the application of the *rusticorum iudicium* the writer found that in *The Resolution*, decided by Sir James Marriott in the year 1789, the rule was applied in a case of "neither ship in fault." From this decision there was no appeal. Further investigation showed that *The Resolution* was not an isolated instance of this application of the rule, and that there was authority for the decision in several earlier cases. It is singular that all these cases, dating between the years 1678 and 1789, should have escaped, as they appear to have done, the notice of the practitioners in the Admiralty Court. The absence of reports, and the rarity of collision cases during this period and for some years after, are the only explanation of their disappearance from legal memory. Not the least remarkable part of the story is the doubt and obscurity which existed at the date (1824) of the decision in *Hay v. Le Neve* as to the application, and even as to the existence, of the *rusticorum iudicium* as a rule of English Admiralty law. The civilians (of whom Dr. Lushington was one) engaged in that case stated, in answer to an enquiry from the House of Lords, that they were aware of no case in which the loss had been divided by the English Admiralty Court. Lord Stowell, however, corrected this by referring to a case (*The Petersfield*, decided in the same year and by the same judge as *The Resolution*) in which the loss had been divided in a case of "both ships in fault." But it does not appear that Lord Stowell was aware of the decision in *The Resolution*, and there is reason to think, from observations made by him in other cases, that he was not aware of it, or of the earlier decisions which it followed. It remains to be decided whether these cases will be followed at the present day. With an unbroken line of decisions for the last fifty years that the rule is confined to the case of "both ships in fault," it probably will be said that *communis error fecit legem*. But in America, where a doubt has always existed as to the rule being confined to the case of both ships in fault, and where Admiralty law has suffered less from the incursions of common lawyers, they may be treated with more respect. It may here be noticed that the series of record books of the Admiralty Court and of the Court of the Judges Delegates (the Court of Appeal from the Admiralty from the latter end of the sixteenth century to the erection of the Judicial Committee of the Privy Council in 1833) is very complete from about the year 1680 downwards. Previous to that date the records, and the sentences during the entire period, are in a terrible state of confusion, and in many cases of decay. The labour of deciphering them is considerable.

'The immediate occasion of the publication of a second edition of this book is the issue of a new code of Regulations for preventing collisions at sea. These are in substance the same as the repealed code. There are, however, additions and alterations of importance. Some of these, such as the rule relating to trawlers' lights, are of doubtful value to seamen; one, the rule as to distress signals, Her Majesty has been ill advised to make, for she has no power to do so.

The constant tinkering of rules intended for the use of seafaring, often illiterate, people is a nuisance and a mistake. The changes made are mostly in the wrong direction. They add to the complexity of the code; some of them are of an unpractical and unworkable character; and the draftsmanship of the entire code leaves much to be desired from the point of view both of the lawyer and the seaman.'

*A Treatise on the Law of Negligence.* By HORACE SMITH.  
2nd Edition. London: Stevens and Sons. 1884. 8vo.  
312 pp.

THIS work well deserves the success it has attained. It is clear and simple in its arrangement; and the discussions of questions of principle are sensible and useful, and at the same time confined within reasonable limits. Its value has been increased by well-selected references to American decisions, as well as to the views of other text-writers, American and English, on the subject.

The author wisely discards the distinctions borrowed from modern civilians (not from the genuine authorities of Roman law) of 'gross,' 'ordinary,' and 'slight' negligence; these degrees of comparison involve, in fact, a confusion between the popular and the legal meanings of negligence. Since in law negligence has a negative meaning and signifies the non-observance of a legal duty (see per Willes J. in *Grill v. Gen. Iron Screw Coll. Co.*, L. R., 1 C. P. 600), the comparison is only applicable to the degrees of care which the law imposes.

Mr. Horace Smith has been the first among practical text-writers to make this the express basis for the arrangement of his subject. He divides the legal relations out of which a duty to take care arises into those in which more than ordinary, those in which ordinary, and those in which less than ordinary care is required. Such a division is not absolutely valid; the amount of care required of e.g. an owner of realty or a wharfinger varies according to the nature of the duty to be performed, and there are many species, such as the care owed to a bare licensee, which refuse to be satisfactorily and finally classed under any one head (see p. 38). The division is nevertheless capable of being satisfactorily made in a very large number of cases, and when it can be made is of clear practical value. Perhaps a broader distinction may be drawn between the cases where a man is answerable only for himself and his servants, and those where (as in *Tarry v. Ashton*, 1 Q. B. D. 314) he is answerable also for the acts and defaults of independent contractors.

In one respect we think the author's definition of his subject is unhappy. 'Negligence,' he says, 'is a breach of duty unintentional and proximately producing damage to another *possessing equal rights*.' The expression 'equal rights' has been apparently suggested by the language of Furrrough J. in *Deane v. Clayton* (7 Taunt. 489, at p. 499): but that was not a case of negligence, but an action for a

nuisance or a wrongful act analogous to nuisance, by the erection of dog-spears intended to kill such dogs as should pursue hares on the defendant's premises. And the words of Burrough J. were not used in the sense in which the author has adopted them. Applied to running-down cases, the phrase is intelligible and appropriate; but apply it to such a case as the neglect to cleanse a sewer (*Hammond v. Vestry of St. Pancras*, L. R., 9 C. P. 316), and it is apparent that either it is not sufficiently comprehensive or the language must be strained to the point of obscurity.

Indeed it is not quite clear whether in this factor of Mr. Smith's definition two distinct elements are not included; (i) That the defendant's right is not paramount nor inferior; (ii) That the plaintiff is a person having a right of complaint for the injury available against the defendant. It might have been clearer to say that 'Negligence is the unintentional breach of a duty to take care in the performance of a lawful act, proximately producing damage to a person entitled to claim the observance of that duty.'

Chap. 5 contains an accurate statement of the doctrine of contributory negligence, the value of which is increased by the illustrations. Indeed, since 'the operation of causes is a most difficult subject to deal with' (per Willes J. in *Walton v. L. B. & S. C. Railway Co.*, 1 Harr. & Ruth. at p. 429), this chapter would be still better if a few more of the leading cases were embodied in the text itself. Such cases as *Radley v. L. & N. W. Railway Co.* (L. R., 1 App. Ca. 754) or *Tuff v. Warman* (5 C. B., N. S. 573; 27 L. J., C. P. 322) are not only landmarks of the law, but make the doctrine easier for the student to realise.

In this edition useful sections have been added on the Negligence of Trustees, Directors of Companies, and Stockbrokers, as well as on the Employers' Liability Act. The judgment of Brett M.R. in *Heaven v. Pender* (11 Q. B. D. at p. 506) is set out in an appendix, as well as interesting comments by Lord Bramwell on the case of *Clayards v. Dethick* (12 Q. B. 439), apparently a fuller form of his remarks in *Laz v. Darlington* (5 Ex. D. at p. 35). We should have been glad to have the author's opinion on the effect of *Heaven v. Pender*; a case of special interest as an example of the combination in our law of the judicial theory of *jus dicere* with the fact of *jus dare*. It does not seem to us possible to reconcile the principle there laid down by Brett M.R. with the case of *Winterbottom v. Wright* (10 M. & W. 109). If accepted as a governing principle at all, it must be subject to limitations which in turn require careful definition; otherwise the inconveniences would follow which were indicated by Byles J. as counsel in the argument of *Winterbottom v. Wright*. The general rule of responsibility for oneself and one's servants, though sometimes harsh in operation, is intelligible; when it is sought to extend responsibility to the acts of people who are not one's servants, the extension must rest on special grounds of policy limited to special classes of cases. This, if we rightly interpret the judgments, is in substance the position taken by Cotton and Bowen L.JJ. in *Heaven v. Pender*.

*De la Responsabilité et de la Garantie (Accidents de Transport et de Travail).* Par CH. SAINCTELETTE, avocat, représentant, ancien ministre. Brussels and Paris. 1884. 8vo. 258 pp.

RESERVING fuller notice of this book, we mention for the present that it deals in an independent and ingenious manner with the whole theory of liability for accidents to persons and property carried for reward, and to workmen in the course of their employment. M. Saintelette makes sure of a distinct terminology from the outset by appropriating the word *responsabilité* to duties imposed by law, and *garantie* to those arising from the terms, express or implied, of a contract. Apparently the tendency of French-speaking lawyers has been to regard liabilities of this kind as *ex delicto* rather than *ex contractu*; M. Saintelette endeavours to correct this tendency, thus approaching the position taken by our own Courts; but this is by no means for the purpose of diminishing the responsibility of carriers and employers. Lord Bramwell has vigorously maintained that a master does not undertake (and ought not to be deemed to undertake), as a term of the contract of service, to indemnify the servant against accidents from the risks incident to the employment. M. Saintelette maintains with no less vigour that he does and ought. We do not collect that M. Saintelette is acquainted with the controversy which led in this country to the Employers' Liability Act of 1880. But as that Act is temporary, and in a few years the question of continuing or amending it will have to be considered, it will be interesting to English lawyers and publicists to see how the subject is treated, under another system of law, from a fresh point of view. As to the measure of damages, on the other hand. M. Saintelette is much more lenient to the carrier than the existing law and practice of this country or (as we understand) of France and Belgium. He would limit compensation for personal injuries to the direct physical consequences of the injury—the doctor's bill, in fact. One or two expressions look as if he would not unwillingly go back, so far as railway accidents are concerned, to a fixed scale of fines—so much for an arm, so much for an eye, so much for a tooth—like those which satisfied our ancestors' notions of civil justice under Ine and Alfred. This is put by M. Saintelette on the ground, in itself quite modern, that the company knows nothing of the rank or profession of its passengers, and cannot be deemed to contemplate, for example, the loss of large trade profits as the consequence of a default in the performance of its contract to carry safely. In the terms of our case-law, M. Saintelette, adopting the principle of *Hadley v. Baxendale*, considers that it is violated by allowing such damages as were given in *Phillips v. L. & S. W. Ry. Co.*

*The Law relating to Works of Literature and Art: embracing the Law of Copyright, the Law relating to Newspapers, the Law relating to Contracts between Authors, Publishers, Printers, &c., and the Law of Libel. With Statutes and Forms.* By JOHN SHORTT. 2nd edition. London: Reeves & Turner. 1884. 8vo. 840 pp.

THIS work, originally published in 1871 and now appearing in a second and enlarged edition, groups together a number of subjects belonging to different branches of law, but connected by the circumstance that they relate to persons engaged in literary production. The plan of the work is happily conceived and carefully executed.

The first part, comprising about one-half of the work, is devoted to the Law of Copyright. The topics are skilfully arranged in a convenient sequence, commencing with a short chapter on the nature of Literary Property. Next, are treated the conditions under which the property is protected, such as that the literary matter is not of a pernicious tendency. The question is then discussed, who may possess copyright; and the author arrives at the answer, in accordance with the opinions delivered by Lord Cairns and Lord Westbury in the House of Lords in *Routledge v. Low* (L. R., 3 H. L. 100); namely, that a foreigner not owing, even temporarily, any duty of allegiance to the Queen, may by publishing in the United Kingdom acquire copyright under the Act of 5 & 6 Vict. The author considers that this position is reinforced by the Naturalization Act 1870, sec. 2, and that the law as laid down by the House of Lords (under the Statute of Anne) in *Jeffreys v. Boosey* (4 H. L. C. 815) is practically obsolete. It is true that in *Routledge v. Low* Lords Cranworth and Chelmsford reserve their opinions on the general question, which was not absolutely necessary for the decision, the authoress in that case having been in Canada at the time of publication. But Mr. Shortt rightly considers that this reservation does not absolve him from indicating his own judgment upon the point raised. Next follow chapters on the property in unpublished works and on crown and college copyright. The seventh chapter, upon copyright after publication, traces clearly and concisely the steps by which the law on the subject has grown up, and gives a brief historical summary of the Copyright Acts. Next are treated, in six successive chapters, the various objects of protection by the law of Copyright—books, periodicals, engravings, dramatic and musical compositions, paintings, sculpture. Colonial and International Copyright are then dealt with, and are followed by a chapter on Transfer of Copyright. The fifteenth and sixteenth chapters contain a very careful and thorough exposition of the law upon Infringement of Copyright, and the remedies for Infringement. Exception might, perhaps, be taken to the unnecessarily frequent use, in these chapters, of the word 'piracy' as a synonym for 'infringement.' It would be a good rule for authors upon Copyright to confine the use of this word to quotations from judicial opinions. So used, it will occur frequently enough to exert a strain

upon the rules of taste and good sense. The part on Copyright concludes with chapters on the American Law, and on Copyright in Designs, topics conveniently left to the end, as only slightly connected with the main subject.

The second and third parts of the work treat of the Law relating to Newspapers, and of Contracts between Authors, Publishers, Printers, &c.

The fourth and last part of the work treats of the Law of Libel; and in a new edition of a book on this subject, the reader will naturally turn to the chapter in which the author deals with the recent charge of Lord Coleridge, in the case of *Reg. v. Fyfe*, with regard to blasphemous libels. The result is satisfactory, and this chapter may be recommended as giving a neat and fair statement of the authorities, and of Lord Coleridge's charge, with a brief and well-reasoned summing up, of the author's own. His conclusion is, in accordance with Lord Coleridge's charge, that 'on a prosecution for the common law offence of blasphemy in our day, the language of the older cases does not express the rule of law now properly applicable, and that the true criterion of criminality is the manner and not the matter of the publication.' In his *addenda* the author mentions that his attention has since going to press been directed, by a pamphlet of Mr. L. M. Aspland, to the opinions given by the Judges to the House of Lords, in 1842, in the matter of Lady Hewley's charities (*Shore v. Wilson*, 9 Cl. and Fin. 355). The opinions referred to are those of Maule J., Erskine J., Coleridge J., Williams J., Gurney B., Parke B., and Tindal C. J. The general tenor of these opinions, and the terms of some of them, go far to support the conclusions arrived at by the author.

From these graver questions, it is a relief to pass to the lighter matter dealt with in the chapter on 'Libels on Individuals,' and to be instructed as to what, according to the decisions, a person may or may not safely say or write of his neighbour. We know that the Scribes of old held refined distinctions in these things; but our own lawyers, for the credit of their profession, can produce a few niceties to match them. It appears to be actionable slander to say that a man has the itch, but you may safely *speake* of him as a scoundrel, rascal, blackleg, rogue or swindler, unless he shows that he has sustained damage in consequence. But any one of these words *put in writing* is actionable. It is easy to imagine that Shakespeare during his apprenticeship to the law was struck with the humour of the distinction<sup>1</sup>; and his muddle-headed officer of the watch—'one that knows the law'—feels that there might be a salve to the sting of the opprobrious epithet, if only he had been *writ down*—an ass! It has been held libellous to publish in a newspaper, of a person who was applying for assistance to a charitable society, that her friends had realised the fable of the '*frozen snake*.' This may be matched by a Scotch case, which does not seem to have found its way into English text-books. A good

<sup>1</sup> [*Quære tamen* whether it was known in his time: see *Thorley v. Lord Kerry*, 4 Taunt. 355. Ed.]

many years ago a daily newspaper published a series of articles in which the name 'Snake' was applied or suggested in various ways in connexion with a highly esteemed citizen. Although there was no tangible imputation, the persistent attempt to fix the plaintiff with a ridiculous or disagreeable name was held actionable; and to the best of the writer's recollection, an interdict was granted.

Altogether, Mr. Shortt's work may be recommended both to the profession and to all who are concerned with the law relating to literature and art, as a comprehensive, discriminating, and well-reasoned treatise, which will fully meet their requirements.

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*Études de Droit Constitutionnel. France — Angleterre — États-Unis.* Par E. BOUTMY. Paris: 1885. 8vo. iv and 272 pp.

M. BOUTMY's excellent little treatise deserves an elaborate review rather than a short notice; for the book is in two respects a most noteworthy production.

It throws, in the first place, a flood of light on the new spirit which animates the rising school of French jurists. Till recent years Constitutional Law formed no part of legal education in France; Frenchmen cared little to study the ephemeral constitutions of their own country, and knew nothing about the politics of foreign states. Of this contented and pretentious ignorance M. Boutmy narrates some humorous examples. In 1793, Hérault de Séchelles enquired at the National Library for a copy of the laws of Minos; not many years back the *Recueil des chartes et constitutions de l'Europe et de l'Amérique* published as the Constitution of the United States the articles of Confederation which were abolished by the creation of the Union; and De Tocqueville, who learned to think before he learned to study, gave his authority to a translation of the existing Constitution of the United States which makes absolute nonsense of its provisions. The new school of French jurists, of whom M. Glisson and M. Boutmy are distinguished leaders, represent a most valuable reaction against the tendency towards hasty and ignorant generalisation which characterised their predecessors. Every page of M. Boutmy's little book shows careful investigation into facts and a firm faith in the historical and comparative method of studying constitutional problems. We do not say that the book contains no errors, but it certainly gives in the main as accurate an account of English constitutionalism and American federalism as we have ever met with in the works of a foreigner. If M. Boutmy has many followers we may soon see in France a body of jurists who combine German learning with French lucidity.

In the second place, these '*Études de Droit Constitutionnel*' set in a new and often very instructive point of view the Constitutions both of England and of the United States. No author we know of has brought out with so much clearness as M. Boutmy the essential points both of likeness and of difference between the constitutionalism of England and the constitutionalism of America; no

writer has drawn so tersely and yet so clearly the exact points of contrast which divide the ready-made logical and so to speak manufactured constitutions of the Continent from the irregular, gradually developed, and self-made Constitutions of the Anglo-Saxon race. The contrast between polities grounded on custom and polities grounded on law is one which will never be forgotten by any student of M. Boutmy's pages.

A. V. D.

*Chitty's Equity Index.* 4th Edition. Vol. II. 'Barbadoes—Education.' By W. F. JONES, B.C.L., M.A., and H. E. HIRST, B.C.L., M.A., both of Lincoln's Inn, Barristers-at-Law. London: Stevens and Sons. 1885. Large 8vo. 1038 pp.

WHEN the third edition of 'Chitty's Equity Index' was published in 1853, it was still possible by digesting only the decisions contained in the Equity, Privy Council, and House of Lords Reports, to collect all the cases on almost every subject which would engage the attention of an Equity Judge. But in these days, when there is scarcely a point of law which may not have to be considered in the Chancery Division, that is impossible; indeed, it is not so much an Equity Index as a 'Complete Case Law Digest' that is now wanted. It may with some truth be said that in 'Chitty's Equity Index' and 'Fisher's Common Law Digest' all the case law will be found, but before one can be certain of having all the decisions on any given subject both works must be searched. In the absence of one digest of all our case law we must be content to have the subjects divided between these two excellent works, although we cannot help feeling that both are materially injured by the observance of that division beyond 1875.

The present volume of Chitty's Index begins with 'Barbadoes,' ends with 'Education,' and includes among others the titles 'Bills of Sale,' 'Charity,' 'Company,' 'Copyright,' 'Covenant,' 'Deeds,' 'Distribution of Estate,' 'Easement,' and 'Ecclesiastical Person and Property.' The task of incorporating all the cases decided in the Equity Courts during the last thirty-two years is of itself a heavy one, but the editors are doing more than that; they are adding new titles and judiciously recasting many of the old ones. The cross references are now very numerous, indeed almost all that can be desired; and much discretion is shown in the rearrangement of titles and sub-titles, although in some instances the alphabetical order of sub-titles has been unnecessarily departed from. The addition of the date to each case would have been a great advantage, and probably in the more general titles, such as 'Company,' the use of heavier type for the sub-titles and more distinctly different kinds of figures would have been better.

*Lockyer v. Vade* (Barnardiston's Chancery Rep. 444) seems to have been overlooked. It should be digested on p. 1998 next to *Ross's Trusts*; and *Crawcour v. Saller* (18 Ch. D. 30) should be again referred



to on p. 1084, after *Re Crawcour*. If, with the last volume, the Editors find it necessary to give a list of addenda, &c., the following cross references should be included: 'Collusion,' 'Copies' (see especially *Re Wade & Thomas*, 17 Ch. D. 348); 'Copyright,' see 'Defamation'; 'Defamation,' see 'Copyright'; 'Cremation,' see 'Ecclesiastical Person and Property.'

The Editors have in our opinion fulfilled all they promised, but the plan of the work must have hampered them a good deal. That plan is at once too wide and too narrow to be completely satisfactory. By 'too narrow' we mean that cases which ought to have been included have been deliberately excluded; to illustrate this we will point to the titles 'Bills of Sale' and 'Company,' from which by the plan of the work the decisions of the Common Law Courts are excluded. By 'too wide' we mean that many cases decided in the Courts of Equity are included, which ought to have been excluded, either because they are useless or because they are practically Common Law cases; the titles 'Bills of Exchange, &c.,' 'Colonial Law,' and 'Descent of Estate-Custom of London and York,' are open to this objection. On the whole, however, the present edition of Chitty's Equity Index will cover ground not occupied by any other Digest, and cover it well.

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*The Patent Laws of the World, collected.* Edited and indexed by ALFRED CARPMAEL, Solicitor, and EDWARD CARPMAEL, B.A., Patent Agent. London: Wm. Clowes & Sons. 1885. 8vo. 696 pp.

THIS work brings together a mass of information, hitherto not readily accessible. The Messrs. Carpmael in making available for popular use the labour they have undertaken as essential to the efficient conduct of their own business in advising upon patent rights have acted with a generous and commendable public spirit.

The collection now published contains *in extenso* the Statutes or Ordinances upon patents in the various countries which use them. Formerly the Commissioners of Patents published from time to time the text of colonial, and translations of foreign laws. But they have for some years discontinued the practice, and the information to be obtained from their publications has become untrustworthy as well as incomplete. In the present collection the gaps left by the Commissioners have been filled up, the translations in most cases revised, and the laws of the more important European countries retranslated. The Index is so constructed as to enable the reader easily to compare the different laws on any particular point.

Apart from its interest to those immediately concerned with inventions, there is in such a collection an element of considerable general interest. The countries which have, or profess to have, a patent law, comprise in fact (with the exception of Holland and Switzerland) the world of modern civilization. As England long held an unchallenged lead in industrial progress, so the English patent law has formed the basis from which the patent law everywhere else has grown up; and the principles which in England are

partly the result of ancient constitutional limits to the power of the Crown are in most other countries embodied by express enactments of comparatively recent date.

In England the Common Law and the Statute of Monopolies (21 James I.) established the principle that the power of the Crown to grant a monopoly, and therefore the validity of the grant itself, is conditioned upon the grantee being the first and true inventor of a new process or manufacture described in the grant. The specification, particularly describing the invention so as effectually to disclose the process, was first required by the law officers who advised the Crown in the time of Queen Anne. It was at that time the struggle of inventors to get a 'patent,' and keep the invention a secret. The power of the Crown to allow disclaimer, and in certain cases a prolongation of the term of the patent, was conferred by express statute in 1835 and 1844. The Act of 1852 retained much of the cumbrous procedure of the Crown Office, which has now been reformed, by the light of experience, under the Act of 1883. Throughout the changes in the law, the principle has been maintained which makes the grant conditional on the novelty of the invention. The principle has been amply justified by experience, and is the essential basis of the patent laws everywhere.

On other points the practice is various. In most countries, following the English example, the preliminary examination is confined to the points that the documents of the applicant are intelligible and comply with the prescribed requirements. In some countries, of which the most important are the United States and Germany, this examination extends to the novelty. According to the evidence given before the late Patent Commission the latter practice is open to great objections. The practice in Germany, according to the evidence of the late Dr. Siemens, tends to the refusal of patents for really great inventions. In America the practice is fairer to inventors, but is, from the nature of the case, of doubtful efficiency. The real advantages of the American system are due to the liberality with which the Patent Office is maintained by Congress, and the completeness of their publications and facilities for information.

The rule that the claim of too much wholly vitiates the patent, though originally the consequence of a strict rule of English law applying to a grant in excess of the power, is very generally adopted. But on this point, and on the consequential requirements as to amendment and disclaimer, the rules of different countries show much variety. The more elastic rules in the United States have their influence in the style of American specifications which, if made the ground of an English patent, are apt to lead to trouble through the multiplicity of novelties claimed. This is a point which deserves more attention than it has usually received in adapting specifications to the different systems under which the patent is applied for.

Perhaps the oddest laws are those of the countries which grant so-called 'patents,' with the option of keeping the invention *secret*

during the whole term of protection. It need hardly be said that these countries are not conspicuous for progressive industry.

The systems in France and Italy, where the grant is made expressly 'without guarantee,' are remarkable for simplicity of forms. In this respect however, the palm is borne by Barbados, where the inventor has nothing to do but to file a complete specification and pay the fees at his own risk. The triumph of red tape is perhaps with Austria, where the documents undergo three formal examinations by different sets of officials. The applicant however has the satisfaction of having his fees returned if the application is rejected.

The principle of compulsory licence appears to have been first adopted, in a somewhat crude form, by Germany (1877). By the law of Luxemburg (1880) a licence is compulsory if declared necessary, by Government order, for the public interest. And there is a provision for ascertaining the terms by judicial decision. The principle is now adopted in the United Kingdom by the Act of 1883, and it is left to the Board of Trade to order the licence to be granted and to settle its terms. This is an example not unlikely to be followed by other countries in the future.

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*Commentaries on Equity Jurisprudence.* By Hon. Mr. JUSTICE STORY, LL.D., sometime one of the Justices of the Supreme Court of the United States. First English Edition, by W. E. GRIGSBY, LL.D. (Lond.), B.C.L. (Oxon.), &c. London: Stevens & Haynes. 1884. Large 8vo. lxxiii. and 1093 pp.

It is probable that the magnitude of the subject with which Mr. Grigsby has attempted to deal is such that no work limited to a single volume can satisfactorily deal with it. It is difficult to see what purpose Mr. Grigsby's work can serve. The additions made to the text and notes in the recent American editions are cut out, and we have the original Story, *plus* Mr. Grigsby. Much valuable and useful matter, even to an English practitioner, is thereby lost. Moreover its place is not supplied. There is a wide chronological gap between Story and Grigsby. Their respective work is not sufficiently distinguished for the unlearned. It is either amusing or misleading to read that 'both the courts of common law and the court of probate have cognizance of administrations; and many suits respecting the administration of assets are daily entertained therein,' without any note or comment to indicate that the description is not perfectly accurate in England at the present day. And in the notes we have the most ancient and the most modern cases cited without any distinction showing which are cited by Story and which by Mr. Grigsby. Then Mr. Grigsby's work, when detected, is in many cases totally inadequate. We are for instance left in ignorance whether full payment of the purchase-money for land will take a case out of the Statute of Frauds, inasmuch as Mr. Grigsby's book gives us nothing later than the 'striking remarks' of Lord St. Leonards in the *seventh* and *tenth* editions of his 'Treatise

on Vendors.' One would have imagined that if later editions by the author himself omit the 'striking remarks,' Mr. Grigsby might well have done the same; while if not, then the later editions should have been quoted. 'Part-performance' is not a title which appears in the Index. Nor is 'Retainer' by an executor. The law relating to the rebuttal under the 'loco parentis' doctrine of resulting trusts, so far from being brought down to August 1884, as the author's preface would lead us to expect, is illustrated only by a judgment in Cox, and a reference to Keen. It is to be greatly regretted that a book of such international reputation as Story's Equity Jurisprudence should have attracted Mr. Grigsby's ambition. But the views expressed in Mr. Grigsby's preface concerning the effect of recent legislation show such an entire want of practical experience in the writer that there is, we trust, no reason to fear that the reputation of our English lawyers will suffer in the eyes of Americans through Mr. Grigsby's treatment of their great jurist.

Mr. Grigsby's name is followed by a goodly list of academical honours. Such honours ought to be the pledge of serious professional achievement, and so far from mitigating criticism, entitle us to expect that the wearer of them will justly and truly fulfil their promise. There is no substitute for honest and thorough work in any science or art whatever, and least of all in law.

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*The Law and Practice of Compensation for taking or injuriously affecting Land, with an Introduction, Notes, and Forms.* By S. WOOLF & J. W. MIDDLETON. London: Wm. Clowes & Sons, Limited. 1884. 8vo. 810 pp.

THIS is essentially a practitioner's book, and as such there is no doubt of its value. It is full and, so far as we have tested it, accurate, and though from one point of view it is rather a clumsy work, this is a consequence of the subject and the mode of treatment. Unlike Mr. Cripps's smaller but more polished and elaborate work, this book is simply a collection of the Acts which are connected with the question of compensation for the taking of land, with notes to the several sections. As there are nearly eight hundred pages of Statutes and notes, it must be confessed that it is a somewhat undigested mass. For the introduction consists of some seventy pages, not included in the general paging of the volume. Though called an introduction, it is in fact a very concise epitome of the contents of the book, but it is so short as really not to be of value to the practitioner, who will go at once to the main body of the work for assistance. It would indeed have been better omitted, since any one who desires a bird's-eye view of this branch of the law will seek it in other works. There are more than twenty-three Statutes set out, including not only our old familiar friend the Lands Clauses Consolidation Act 1845, but newer acquaintances, such as the Artisans' Dwellings Act 1868-1882, and the Public Health Amendment Act 1883. The authors' modus operandi is to set out the Acts in full and then to give in a note—more or less

lengthy—the necessary explanations, cases, and references. One obvious criticism on the cases is that they have been heaped into the notes somewhat too lavishly. A book such as this is not intended to take the place of Fisher or the Law Reports Digest, but over and over again there are a string of cases given without discrimination. Thus, on p. 188 it is said, ‘Promoters will be restrained from entering upon lands until they have settled with all persons having interests in the lands of which the promoters have notice.’ To support this simple but rather obscurely worded proposition no less than five cases are given, without any explanation as to whether they differ or not. It is enough to give this one instance, but this fault has certainly increased the size of the book unnecessarily. There are also some sections of the Acts which might with advantage have been omitted, such as sects. 3 and 4 of the Artisans’ Dwellings Act 1875, the effect of which not being material to the subject of Compensation could have been stated in a few words. But these criticisms in detail do not affect our general statement, that this book is one of considerable value to practitioners, while its compilation shows very great industry, research, and care on the part of its authors.

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*A Treatise on the Law of Evidence.* Eighth Edition. By His Honour Judge PITT TAYLOR. London: W. Maxwell & Son. 1885. 2 vols. 1935 pp.

JUDGE PITT TAYLOR finds a melancholy satisfaction in the reflection that he does not intend himself to bring out any further edition of his standard work on Evidence. Indeed he tells us that when he considers the difficulties ‘strewn in my path by the peculiar embroilment of recent legislation, I can only marvel at my own intrepidity in venturing to prepare for the press an Eighth Edition.’ Among the more conspicuous of the recent pieces of legislation of which Mr. Pitt Taylor has had to take account in preparing the present edition, are the recent Acts relating to Bankruptcy, Bills of Exchange, Bills of Sale, Corrupt Practices, and Married Women’s Property, as well as the Rules of the Supreme Court, 1883. There is perhaps not very much in these enactments, and the others referred to in the preface, which directly affects the law of what is evidence, or of how it is to be given, but as it is Mr. Pitt Taylor’s method to state loosely every part of the law of England which can, so to speak, be looked at from an evidence point of view, it is not difficult to understand that the work must have been laborious. As far as appears, what is new has been woven into a place which does for it well enough in a book which makes no pretence to scientific or indeed to any arrangement. The value of such books must always depend principally upon the index, and most people who have had occasion to make practical use of it know that Mr. Pitt Taylor’s index is excellent. Whoever prepares the ninth edition will be able to cite the recent case of *Reg. v. Cox & Railton* in proof that the author’s anticipation on the subject of professional

privilege invoked for the protection of crime (p. 784) is perfectly correct. On the other hand, he may repair Mr. Pitt Taylor's omission to refer in appropriate places to the Explosives Act, 1883, the fourth section of which not only throws the burden of proving a lawful intention on a prisoner charged with being in possession of an explosive substance, but also makes every such prisoner as well as his wife or husband a competent witness in the case. Perhaps however we may hope that before that time the competence of accused persons to give evidence will have been made the rule and not the exception.

*Some Leading Principles of Anglo-American Law expounded with a view to its Arrangement and Codification.* By HENRY T. TERRY, Professor of Law in the University of Tokio, Japan. Philadelphia: T. & J. W. Johnson & Co. 1884. 8vo. xxxv and 686 pp.

MR. TERRY'S aim has been to expound the Common Law, of which the present formless condition is in his opinion 'fast becoming unbearable,' in such a scientific arrangement as may lighten the student's labours and help to point the way to ultimate codification. He has apparently been more influenced by Austin than by any other theoretical writer, but he is alive to the need now generally felt of at least tempering Austin's dogmatism. Mr. Terry carefully points out that 'any one who seeks a definition of law will have to frame it according to the purpose for which he wants to use it,' and accepts Austin's definition only as being 'in the main correct' with reference to 'the highly developed conception of law that prevails in the most advanced societies.' Likewise he has used Judge Holmes's work (perhaps the best corrective of Austin yet extant) with good effect: and he is not afraid of using the old forms of action as symbols, even as tests, of real distinctions in principle. So far as we have looked into Mr. Terry's handling of his matter in detail, it appears decidedly good. He does not shuffle off difficulties under the cloak of authority, but resolutely attacks such problems as that of separating the elements of tort and of contract in the class of cases where the facts are capable of producing a cause of action of either kind: a problem whose difficulty will be appreciated by any one who has tried to reconcile *Alton v. Midland Ry. Co.*, 19 C. B., N. S. 213, 34 L. J., C. P. 292, with *Foulkes v. Metrop. Dist. Ry. Co.*, 5 C. P. D. 157. Mr. Terry seems to think *Alton v. Midland Ry. Co.* was wrongly decided, or decided on unsatisfactory reasons; and his view is—since the last-mentioned case at any rate—well entitled to consideration.

The final 'suggestions about codification' contain some severe but just criticism of the draft Civil Code of New York. To the ignorant demand for greater simplicity Mr. Terry forcibly answers, 'The law cannot be made simple without being made barbarous:' and (with all recent writers who have treated the subject rationally) he warns the reader that no code can be made complete or final. He thinks it would be possible in America to

frame a code, or codes, by means of a carefully selected Federal (or even mixed British-American) commission, which could be applied by Congress to the District of Columbia and the Territories, and adopted by the several States if and so far as it was commended to them by its merits. Possibly some of our children may live to see the fulfilment of this pious wish.

Meanwhile Judge Chalmers has been addressing the law students of Birmingham on the more immediate possibilities of codification (Jan. 16: the address is published by Houghton & Co., Birmingham), and seems not unhopeful. The draftsman of the Bills of Exchange Act will at all events not be charged with want of practical experience.

Without committing ourselves to the classification adopted, we think Mr. Terry's work very sound and useful. The only material objection we have to make is that he is rather too fond of inventing new terms of art.

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*The Law relating to Gas and Water; comprising the rights and duties as well of Local Authorities as of Private Companies in regard thereto; and including all legislation to the close of the last Session of Parliament.* By W. H. MICHAEL, Q.C., and J. SHIRESS WILL, Q.C. Third Edition, by M. J. MICHAEL. London: Butterworths. 811 pages.

THIS book is arranged on a plan which is very convenient where the amount of case-law is relatively small, and the numerous statutes on the subject form by no means an harmonious whole. It begins with an introduction, in this edition considerably enlarged and partly re-written, containing a slight history of the course of legislation as to gas and a synopsis of the existing law as to both gas and water supply, with marginal references to the subsequent pages of the work. Then follow the various statutes relating to the subject, set out in convenient order, with full notes of the decisions. The notes to some of the sections cover such a wide field that it seems a pity not to divide them under various headings more clearly than can be done by marginal notes. Such, for instance, are the notes on Compensation, etc. (pp. 191-220), and those which are appended to the 75th section of the Waterworks Clauses Act of 1847 (on the limitation of profits), dealing with the Rating of Waterworks (pp. 263-270).

The editor has added in their appropriate places the few cases relating to the subject which have been decided since the last edition in 1877. He should not have cited (at p. 205) *Cooke v. Chilcott* (3 Ch. D. 694) as being an unquestioned authority: see *Haywood v. Brunswick Permanent Benefit Building Society* (8 Q. B. D. 403), but with this exception the cases have been correctly noted up. The Public Health (Water) Act 1878, the Public Health (Support of Sewers) Amendment Act 1883, and the Lands Clauses (Umpire) Act 1883 have been set out in full in this edition, as well as the Regulations of the Local Government Board with regard to

Provisional Orders and the Circular of the Board to Local Authorities under the Rivers Pollution Prevention Act 1876; and the changes effected by the Summary Jurisdiction Act 1884 in the proceedings provided by statute for the recovery of penalties by Gas and Water Companies have been carefully noted.

Altogether, the book is a most useful and full collection of the statute and case law as well as of practical information relating to the subject in all its branches.

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*The Principles and Practice of Discovery. With an Appendix of Forms.* By EDWARD BRAY, of Lincoln's Inn, Barrister-at-Law. London: Reeves & Turner. 1885. 8vo. xlix and 704 pp.

Books of practice are presumably not meant to be read through; nor is it easy to form an opinion of their merits on a first perusal. So far as we have been able to test Mr. Bray's work it is sound and thorough, and well adapted for its purpose. The rules laid down in some hundreds of cases are stated as far as possible in the words actually used by the judges; and an extremely elaborate system of cross references from one part of the book to another will probably be found useful by those who consult it for practical purposes. It is not possible to explain the present law of discovery without inquiring into the ancient practice of the Court of Chancery and the Common Law Courts. Mr. Bray's work is therefore not without interest for the student of legal history. At p. 264 he gives an account of the practice of Proferret and Oyer, abolished by the C. L. P. Act 1852, and of the equitable powers assumed by the Common Law Courts in the last century, when they allowed a party to inspect documents in his adversary's possession to which he was himself a party in fact or in interest. The merits of Mr. Bray's book have been cordially recognised by Kay J. See *Foakes v. Webb*, L. R., 28 Ch. D. at p. 290.

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*The Practice as to Letters Patent for Inventions, Copyright in Designs, and Registration of Trade Marks under the Patents Designs and Trades Marks Act, 1883, &c.* By WILLIAM NORTON LAWSON. London: Butterworths. 1884. 8vo. 380 pp.

THIS is a very careful and well-digested commentary on the Act of 1883. The text is arranged, on the principle adopted in Mr. Buckley's well-known book on Company Law, under the various sections of the Act to which the special matter more particularly relates. It is a method of arrangement which has been too often adopted to cover slipshod and hasty work; but where the work is done thoroughly and well, as in Mr. Buckley's book and in this one of Mr. Lawson's, the system has considerable advantages.

If there is one part of his book on which Mr. Lawson has bestowed



special pains, we should say it was that which relates to the various points of practice in an action for infringement of patent. On all that relates to the conduct of a patent action the book seems to leave nothing to be desired. The notes to section 29 of the Act contain a very complete analysis of the requirements as to pleadings and particulars specially relating to patent cases; and those to section 30 are perhaps not less valuable as bringing together the authorities upon the practice specially relating to patents in regard to interlocutory applications.

The Board of Trade Rules are set out *in extenso*. The Appendix contains a well-selected set of specimens of orders of various kinds, forms of particulars in patent actions, and form of petition for extension. The Index is adequate and conveniently arranged.

Although the author in his preface modestly disclaims the attempt to make his book a treatise on the Law of Patents generally, his book is more than a mere book of practice. Indeed, if we except questions of *novelty*, which in themselves might form the subject of a separate treatise, it would be difficult to find a book containing a greater amount of sound information upon patent law.

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*A Treatise on the Law of the Statute of Frauds, and of other like enactments in force in the United States of America and in the British Empire.* By HENRY REED. Philadelphia: Kay & Brother. 1884. 3 vols. 8vo. x. and 773, vi. and 631, iv. and 554 pp.

THE sage Manu wrote a book in 100,000 couplets and delivered it to Narada. Narada said, 'This book cannot be easily studied by human beings on account of its length.' He made an abridgment of the book in 12,000 couplets and gave it to his disciple Sumati, who in turn abridged it to 4,000. 'It is only the gods who read the original code. Men read the second abridgment, since human capacity has been brought to this through the lessening of life.' Perhaps the lawyers of Philadelphia are as the gods. We are but mortal and we do not expect to master Mr. Reed's exhaustive treatise on the Statute of Frauds, unless it finds a Sumati in our lifetime. In seriousness, a treatise on this scale is in truth as much a work of reference as a lexicon, or as Fisher's Digest itself. As far as we can tell from a cursory inspection, Mr. Reed, assisted by other learned persons whose names he gives in the prefaces to vols. 1 and 2, has done a thorough piece of work which should save much toil (especially in America) to those who come after. Most if not all of the States have adopted the Statute of Frauds either as it stands or with more or less verbal revision. Their several Statutes are given by Mr. Reed in an Appendix. Analogous doctrines of other modern systems (such as the Scottish *rei interventus* in the matter of part performance) are cited for illustration, though the main object is to give a full digest of English and American decisions. There is also a chapter of historical introduction. The statement that Chief Justice Scroggs 'achieved his reputation rather as a criminal

jurist than a civil one' savours of a grim humour commonly associated with lands farther West than Pennsylvania. We have heard a not wholly dissimilar example of *litotes* from a Western Territory: 'Our jail is very weak, and we have no use for any of the men on this list,' said the president of a Vigilance Committee to an officer of Texan Rangers whose services had been called in. We do not think that any note or memorandum in writing was made of this remark, and we are therefore unable to vouch for its textual accuracy.

*The Yorkshire Registries Act, 1884, with Rules and Forms, &c.*

By REGINALD J. SMITH. London: Clowes and Sons, Limited. 8vo. pp. xx and 88.

THE Yorkshire Registries Act, 1884, does much more than consolidate previous Acts. It is a strenuous attempt to make the Register a complete guide to the title of every plot of land. For this purpose the old equitable doctrine of notice, which has done so much to nullify prior Acts, is rigorously abolished; so is the doctrine of tacking, and the 'tabula in naufragio' of the legal estate will no longer be available where the Act applies.

One notable feature of the Act is the complete publicity which it enforces. Any one may search the registers, and any one may make copies or extracts therefrom, though, oddly enough, by a rule of the county authorities, i.e. the Justices, extracts must be made in pencil only (Rule 5, *op. cit.* p. 42). The history of conveyancing is in one view little else than a history of shifts to avoid publicity, and it is conceivable that some device may be found to evade the Statute in this respect. How so stringent a law will work remains to be seen; and the experiment is evidently of more than local interest. Should the system fully succeed in Yorkshire, it may be asked, why should it not succeed throughout England? Varying a well-known county proverb: What Yorkshire thinks to-day, England may possibly think to-morrow.

We notice that Mr. Smith seems to think (*op. cit.* p. 4) that it will be useless to register a voluntary assurance under the Act. If we are right in so understanding him, we do not agree; such registration would be valuable, at all events, as against later voluntary assurances by the same grantor or settlor. On the whole, however, Mr. Smith's criticisms are intelligent, and his introduction and notes perspicuous; and we feel little doubt that this handbook will command a deserved popularity in the districts which it concerns.

*La nouvelle loi sur les sociétés anonymes en Allemagne.* By ARTHUR RAFFALOVICH. Paris. 1884. Pamphlet.

THE manifold labours of the Germans resulted last year in a new law regulating Joint Stock Companies, of which, and of previous German legislation on the subject, the essay of M. Raffalovich gives an interesting résumé. The legislative question arising as to Companies is the extent to which a benevolent

government should protect its children against the snares of promoters. In England the public is still left very much to its own wisdom or folly; the law exacts little from promoters save the setting forth of a prospectus which must not carry imagination into the realms of the strictly untrue. The Germans have passed from the early system of strict concession and control by Government, through a period of relaxation, to the present law, which subjects companies to a surveillance more stringent than any which has existed since the law of 1870. The relaxation of the law in 1870 was preceded and followed by a period of industrial expansion in Germany, artificially furthered by the influx of the five 'milliards' from France. To this succeeded a period of contraction, during which many of the bubble companies which had been started suffered shipwreck, and the Germans were taught by experience of what deeds the unchecked promoter is capable. Guided by this experience, their legislators have now surrounded with precautions the birth of companies. It is the duty of the Registrar before sanctioning a company to see that its contract of association is in conformity with the numerous requirements of the new law. All the capital must be subscribed and in part paid up before the company can be registered. The prospectus, which is carefully regulated, is embodied in the statutory form of application for shares. It seems probable that future legislation in England will take the shape of greater control of companies by the representatives of the public interest. Sir John Lubbock's present Bill, for example, is based on the principle that the objects of the intended company should be more explicitly set forth.

*The Powers, Duties, and Liabilities of an Election Agent and of a Returning Officer at a Parliamentary Election in England or Wales; with a Table of Election Statistics, an Appendix of Forms, and all the Statutes required during an Election.* By FRANK R. PARKER, Solicitor and Parliamentary Agent. London: Knight and Co. 1885. 8vo. xxxvi. and 686 pp.

THIS work will be found a most valuable guide through the intricate labyrinth of Statute Law to be threaded in English Parliamentary Elections. The powers, duties, and liabilities of Candidates, Election Agents, and Returning Officers are clearly set forth in full and practical detail. The author has done his best to give explicit and safe instructions, and to save trouble to those who will use his book in a time of pressure. His work is sound and thorough, and contains a very complete appendix of forms. On occasion he has not been afraid of repetition, and his index is full and good.

He also gives an appendix and a conveniently arranged table of Statutes. Another appendix, made somewhat obsolete by the Redistribution Bill, contains interesting statistics of the general election of 1880, and contrasts the actual expenses of the candidates with the maximum allowed by Sir H. James's Act.

*A Digest of the Law of Husband and Wife as it affects property, and the Married Women's Property Act, 1882, with Notes and Illustrations, with Appendix of Statutes, Forms, and Precedents.* By R. THICKNESSE. London: H. Maxwell & Son. 1884. 8vo. 461 pages.

THIS is stated to be 'in lieu of a second edition' of the author's work on the Married Women's Property Act, 1882, and it is in fact a new work, Mr. Thicknesse having re-cast his commentary in the form of a codified Digest, with articles, exceptions, and illustrations. It may be doubted whether this subject is in so fixed a state as to be quite ripe for codification. Thus the first article lays down the rule that the contract of marriage makes husband and wife one person and that the personalty of the wife is merged in that of the husband, but there follows a very large exception to this in the case of women married after January 1, 1883. Which is the exception and which is the rule it is as yet not easy to say. Apart from these inherent causes of difficulty, Mr. Thicknesse's exposition is clear and even elegant, and as far as we have tested his law it seems to be correct. He has been diligent in distinctly conceiving the various questions that may arise out of the present transitional state of the law of married women's property, and in indicating the probable solution where such conjecture is prudent. We have been accidentally prevented from submitting Mr. Thicknesse's book to a detailed and critical examination; but our general impression of it is a favourable one, both as to matter and as to form.

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*A Concise Treatise on the Law of Marriage Settlements, with an Appendix of Statutes.* By HENRY THOMAS BANNING. Stevens & Sons. 8vo. 320 pages.

MR. BANNING calls his little book 'A Concise Treatise on the Law of Marriage Settlements,' but it is really a collection of notes on various matters relating to settlements generally. The space which is given to such subjects as 'Frauds on Marital Rights,' 'Marriage Brokage Contracts,' 'Parental Influence,' and 'Voluntary Settlements,' would have been better devoted to subjects more peculiar to marriage settlements, for there are more omissions than we expected to find in a book by the author of the work on 'The Statutes of Limitation.' Among the omissions may be mentioned the following. The question whether on the second marriage of, and settlement by, the surviving parent of children, such children are within the marriage consideration, is dealt with on page 5, but that the answer may depend on whether the surviving parent is the father or the mother is not suggested, although the judgment of Fry J. in *Gale v. Gale* is referred to. The 4th section of the Statute of Frauds is discussed, but the question how far a parol agreement made upon consideration of marriage can be set up by subsequent

recognition in writing is not mentioned. In the chapter on Ultimate Trusts the meaning of the word 'unmarried' is considered, but no reference is made to *Emmins v. Bradford* (13 Ch. Div. 493) or *Dalrymple v. Hall* (16 Ch. Div. 715); and the omission of *Meinertzen v. Walters* (L. R., 7 Ch. 670) from the chapter on Satisfaction is almost as remarkable as the omission of *Honywood v. Honywood* (L. R., 18 Eq. 306) and *Baker v. Sebright* (13 Ch. Div. 179) from page 167, where waste by cutting timber is discussed. The book does not deal with failure of the objects of the trusts, but there is a chapter styled 'The Failure of the Object of the Settlement,' from which it would seem that 'the object' of the settlement is the marriage. The note on Domicile (p. 247) is strangely worded, and is too limited to be of practical use. If we have expected too much the title-page and preface have misled us. In our opinion the chief merits of the book are that it contains within a small compass much useful information relating to an important and difficult subject upon which there is no recent work; that, among the cases cited, some were reported within two months of the publication of the book; and that the effect of those cases is generally accurately given.

*Some Observations upon the Law of Ancient Demesne.* By PYM YEATMAN. Sheffield: Leader & Sons; London: Mitchell & Hughes. 1884. 8vo. 73 pages.

THE competence of the author of this tract to deal with his subject will be plainly apparent to any one who will read the following remarks:—

'Before dismissing this subject, reference must be made to the famous statute of Charles II, commonly called the Statute of Fines and Recoveries. At that period, just as at the present day, all true knowledge of the subject of ancient demesne was lost; men's minds were intent upon the destruction of everything bearing the remotest relation to feudal tenures, and it was supposed, because this tenure was of an ancient character, that it was necessarily open to objection, and an attempt was made to prevent the operation of the laws cited by Coke and Fitzherbert, by which these rights were restored, but inasmuch as the framers of the Act knew no distinction between the Royal and the private rights of these tenants, they omitted all mention of the former, and as it is a rule in the construction of statutes that the rights of the Crown are not touched unless especially named, it would seem that the statute is wholly inoperative, so far as regards tenants of ancient demesne of the Crown of England.'

It would seem then that Mr. Yeatman's researches have discovered a famous statute of which all true knowledge had been lost, unless indeed Wards and Liveries are commonly called Fines and Recoveries, or Charles the Second is commonly called William the Fourth. That the statute is wholly inoperative as far as regards tenants of ancient demesne and all other persons we can somewhat readily believe.

*Commentaries on the Common Law, designed as Introductory to its Study.* By HERBERT BROOM, LL.D. Seventh Edition, by W. F. A. ARCHIBALD and HERBERT W. GREENE. London: W. Maxwell & Son. 1884. 8vo. 1129 pp.

IN this, the first edition since Dr. Broom's death of his text-book on the Common Law, his editors have made such additions and alterations as changes in the law since 1880 have rendered necessary. The discussion of the law relating to Married Women and Employers' Liability has been expanded by a clear statement of the effect of the recent statutes; the chapter on Negotiable Instruments and the section on Action at Law have been carefully revised and reconstructed with reference to the Bills of Exchange Act 1882 and the Rules of the Supreme Court of 1883; the treatment of Easements has also been enlarged and improved; and the effect of recent cases, where needful, has been gathered into the text.

In short, the work of re-editing has been well done, assuming that it was worth doing at all: as to which we do not feel called upon to express an opinion.

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*Probate and Administration Law and Practice in Common Form and Contentious Business.* By W. JOHN DIXON. Second Edition. London: Reeves and Turner. 1885. 8vo. 630 pp.

THIS edition is in many respects a great improvement upon the first. The length of the book is reduced by a third without the sacrifice of any material portion, and the various Probate rules are cited in full in the footnotes under the headings to which they apply instead of in a separate appendix. There is still, however, great room for improvement, as there seems no use in printing the Supreme Court Rules of 1883 very nearly in full under 'Practice,' and so occupying space which would be better filled by a more careful statement of the special practice in Probate. The work would also be improved by fuller explanation of the practice of the County Courts, and as to Scotch Confirmations and Irish Probates. Probate duties and proceedings within the Customs and Inland Revenue Act 1880 might be treated of with advantage.

Mr. Dixon has on many points cited the authorities very fully, but elsewhere he has omitted decisions which ought to have been cited (e.g. *Noble v. Phelps and Willock*, L. R., 2 P. & M. 276, as to wills of married women). Some of the recent cases, which ought to have been referred to (e.g. *In the Goods of Prince Oldenburg*, 53 L. J., P. D. & A. 46, 33 W. R. 724, 9 P. D. 234), are not mentioned even in the Addenda, whilst others, such as *Threlfall v. Wilson*, 8 P. D. 18, are only mentioned in the Addenda, though reported in 1883.

There are numerous errors, especially in punctuation, which might have been avoided by a more careful correction of the proofs.

When a book is neither well written, well arranged, nor well printed, one cannot honestly say it is a good book. Mr. Dixon's book, nevertheless, is good enough to be useful for want of a better; and on this subject there is not a better at present.

*The Complete Annual Digest of every reported case in all the Courts, for the year 1884.* Edited by ALFRED EMDEN, assisted by HERBERT THOMPSON. London: Wm. Clowes & Sons. 1885. Large 8vo. 558 pp.

THIS is a useful addition to the resources available for reference to the ever-growing body of case-law. It would be rash to vouch for the authors having embodied every reported case for the year, but we cannot charge them with any omission. The order of arrangement follows, of course, the main lines of the digests in familiar use. This is a necessary condition of a book of the kind meant to be used in the hurry of practice. But the arrangement is not quite slavishly followed, and is in some instances slightly improved upon. Thus under 'Will' we have the subordinate heading 'construction,' under which the headings of 'absolute gift,' 'ambiguity,' &c. are again subordinately grouped in alphabetical order. This seems better than interspersing questions of construction with questions of 'Invalid trust,' 'Revocation,' &c. On the other hand the unwieldy head of 'Practice' is at once split up into a large number of subordinate headings such as 'accounts, &c.'; which is a distinct improvement on the method of the Law Reports Digest.

*'Morgan's Chancery Acts and Orders.'* Sixth Edition. By the Right Hon. G. O. MORGAN, Q.C., M.P., and EDWARD ALBERT WURTZBURG. London: Stevens & Sons. 1885. Large 8vo. lx. and 723 pp.

A FULL and elaborate book of practice like this can be tested only by practice. Accordingly, we shall submit this new edition (which is in substance a new book, if it bears out its professions) to that test, and report further on its merits in a future number. For once we have broken the rules of bibliography for brevity's sake, and described the book by its well-known short title.

*Winding-up Forms.* By FRANCIS BEAUFORT PALMER. London: Stevens & Sons. 1885. 8vo. 538 pp.

MR. PALMER'S collection of winding-up forms is a companion volume to his useful work on 'Company Precedents,' and appears to be very complete. The profession owes much gratitude to those who are at the pains to forge such necessary tools as these. The Appendix, inter alia, gives a concise bird's-eye view of the cases in which persons have either succeeded or been foiled in their endeavours to escape being settled on the list of contributories under section 38 of the Companies Act 1862.

*The London Companies Commission: a comment on the Majority Report.* By GEORGE H. BLAKESLEY. London: Kegan Paul, Trench & Co. 1885. 8vo. 63 pp.

MR. BLAKESLEY does not undertake to discuss the general merits of the City Companies question. But he endeavours to show, and goes near to show in our opinion, that the reasons given for their conclusions by the majority of the Commissioners are on the face of them unsatisfactory. To talk of the Companies having been first 'in effect a Municipal Committee of trade and manufactures,' and then 'an institution in the nature of a State Department for the superintendence of the trade and manufactures of London,' is intolerably slovenly to lawyers' ears (if nothing worse), when the purpose is to justify an exercise of the eminent domain of the State, by means of special legislation, over funds which are legally private property. We have no wish—indeed it is hardly within our province—to express an opinion on the main question. But if it is politic and expedient to convert to public uses property of which the Companies now claim to dispose at their own pleasure, the grounds of policy should be plainly stated as they are now conceived to exist, not bolstered up with semi-conjectural statements of something which is not history, and is not capable of ever having been law. The strictly limited plan of Mr. Blakesley's pamphlet prevents him from noticing the opinions given by Mr. Horace Davey and Mr. Vaughan Hawkins. It is needless to say (to members of the Chancery Bar at all events) that these are far more instructive and important documents than the conflicting reports and memoranda of the Commissioners.

AMONG the *Johns Hopkins University Studies* (Baltimore), 'Rudimentary Society among Boys,' by John Johnson, jun. (2nd Ser. xi, Nov. 1884), is both amusing and curious. It describes (inter alia) how the boys of a school near Baltimore have by the light of nature worked out an elaborate law of occupation and possession with regard to the appropriation of trees for bird's-nesting purposes. Mr. Johnson even reports a case in which something very like the doctrine of 'purchase for value without notice' was enforced by the primitive court in which the boys are both suitors and judges. Then butter, of all things in the world, has become a money of account among the boys; the fixed allowance of butter at meal-times ('order' as they say at Eton) being the unit. A half-butter = one cent approximately. The rise of lords and monopolies in a communal society, and the economical effects of State regulation, are also not without their illustrations in this quaint little book. 'Land Laws of Mining Districts,' by Charles Howard Shinn (2nd Ser. xii, Dec. 1884), gives an account of the conventional laws peculiar to the Western mining districts of the United States, which in some respects unconsciously reproduce the ancient custom of 'tin-bounding' still recognised in Cornwall (*Ivimey v. Stocker*, L. R., 1 Ch. 396).



*Politics and Economics: an Essay on the Nature of the Principles of Political Economy, together with a Survey of recent Legislation.* By W. CUNNINGHAM, B.D. London: Kegan Paul, Trench & Co. 1885. 8vo. ix. and 275 pp.

*Christian Opinion on Usury. With Special Reference to England.* By W. CUNNINGHAM, B.D. Printed for Macmillan and Co. Edinburgh. 1884. 8vo. 84 pp.

MR. CUNNINGHAM'S 'Politics and Economics' belongs, on the whole, to the reaction against individualism. It treats economical problems from the point of view of *Staatswirtschaft* rather than from that of current English doctrine. The discussion of recent economical legislation—the only part which concerns us here—proceeds in this spirit, refusing to accept any fixed dogmas whatever as to the proper limits of State action. An extract from the chapter summing up the results may give some notice of the author's ideas and method:—'Between the Merchant Shipping Act of 1876 and the Irish Land Bill of 1881' [Mr. Cunningham uses 'Bill' as a synonym of 'Act' in a rather perplexing manner] 'there is a curious parallel. Both were advocated on high moral grounds; both were introduced by ministers who had repudiated the principles on which they were based; both were passed because of the pressure of agitation outside the house; both were condemned by careful and fair critics at the time, and in both cases the condemnation has been amply justified. . . . There is great danger in seeking to do what appears right on political or social grounds unless we weigh carefully its economic bearings. The whole history of English dealings with Ireland is the history of sacrificing industrial good for political purposes—political purposes that did not seem unjust to the men who carried these measures.' In a country where both the theory and the practice of legislation are very much at the mercy of party motives, impartial and well-informed criticism like Mr. Cunningham's is always welcome. Mr. F. C. Montague's extremely well-written essay on 'The Limits of Individual Liberty'—a work belonging to the general philosophy of politics rather than to jurisprudence—is to be remarked as a like sign of the times.

We notice the other little book for the sake of the frontispiece reproduced from Blaxton's 'English Usurer.' The little devil standing on the back of the usurer's chair is as delectable a devil as we have ever seen. For the rest, Mr. Cunningham's object is to trace the development of ecclesiastical opinion from the third to the seventeenth century on the distinction between lawful and unlawful profits made by the use of capital, and to show that the mind of the Church was never out of harmony with that of discreet laymen. Mr. Cunningham tells his story well, and probably enough he is right. And his general reflections may have a legal bearing in countries where usury laws still exist. But English lawyers, as such, have now no point of contact with such a work. *Non est de nostra facultate*, as the theologian is supposed to say of grammar somewhere in the 'Epi-tolae Obscurorum Virorum.'

## NOTES.

THE operations of the French in China may probably raise a good many questions of International Law. It seems that they have not been restrained by the usages of war as between belligerents from destroying fishing junks and obliging prisoners to assist in the construction of batteries. Their announcement that rice will be treated as contraband shows as little regard for the rights of neutrals. It is true that in the sixteenth century Queen Elizabeth, and in the seventeenth the United Provinces, took upon them to forbid the carriage of corn to Spain. But the pretension was soon much narrowed, and its apparent revival during the struggle against revolutionary France was avowedly exceptional. Thus the Order in Council of 1793, which was met with indignant protests on the part of Denmark and the United States, was excused on the ground that the corn trade of France with foreign countries was no mere private speculation, but a business immediately carried on by the 'pretended government' of that country, and on the ground that the whole labouring class of France, upon which the effects of a scarcity would chiefly fall, had been armed against the other governments and the tranquillity of Europe. All modern authorities are agreed that provisions as a rule are free. Most writers would make an exception only against provisions intended for a place blockaded or besieged, and this is doubtless what was meant by Vattel when, in a passage which has been misunderstood, he classes as contraband 'les vivres même, en certaines occasions où l'on espère de réduire l'ennemi par la faim.' The English and American Prize Courts go a step further, and allow the capture of provisions having a highly probable destination for military use, e. g. if bound for a port of military or naval equipment. (See Lord Stowell in the *Jonge Margaretha*, 1 Rob. 194, and the U. S. cases, the *Commercen*, 1 Wheaton, 382, and the *Peterhoff*, 5 Wallace, 56). A return to a harsher practice would come with a singularly bad grace from the French, whose tendency has always been in the other direction. The Ordonnance of 1681, Valin, Pothier, in fact all their best writers, are on the side of leniency. M. Ortolan goes so far as to lay down that 'les vivres et tous objets de première nécessité ne peuvent, en aucun cas et pour quelque motif que ce soit, être rangés dans la contrebande de guerre, sauf les droits résultant du blocus.'

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T. E. H.

WHY should not a single Court of Appeal be formed by abolishing the present Court of Appeal and turning its members into law lords? This is a question forcibly suggested by the *Appeal Cases* for March. No one can read them without seeing that the present system of double appeal has two defects. It prevents us from having the strongest appellate tribunal which has ever existed in England; it increases to an incalculable extent the uncertainty of the law. Take, for example, *Sewell v. Burdick*, 10 App. Cas. 74. That decision at last determines with some certainty the effect of the indorsement and delivery of a bill of lading by way of pledge. It settles that such indorsement does not pass the 'property in the goods' to the indorsee within the meaning of the Bills of Lading Act, 18 & 19 Vict. c. 111. sec. 1, and establishes the perfectly clear principle contended for by Bowen L.J. in the Court of Appeal, that the indorsement and delivery of the bill of lading like the actual transfer of goods depends for its effect, as far as the rights of the immediate parties are concerned, upon the agreement between them. If they intend to sell the goods, the ownership in the goods is transferred; if they intend simply to pledge the goods, then the goods are pledged and the ownership remains in the pledgor. But up to the 5th December last, when the judgment of the House of Lords was delivered, every one was bound to hold on the authority of the Court of Appeal that indorsement and delivery of a bill of lading by way of pledge did transfer the ownership in the goods to the indorsee within 18 & 19 Vict. c. 111. sec. 1. If *Sewell* had for any reason not appealed, the law might have remained uncertain for years. No blame attaches to the Court of Appeal, but one may reasonably doubt the wisdom of maintaining more than one appellate tribunal.

*Seward v. The Vera Cruz*, 10 App. Cas. 59, decides that the Admiralty Court Act 1861 (24 Vict. c. 10), sec. 7, does not give jurisdiction over claims for damages for loss of life under Lord Campbell's Act, 9 & 10 Vict. c. 93, and that therefore the Admiralty Division cannot entertain an action in rem for damages for loss of life under that Act. This determines a point of practical importance about which there have been curiously conflicting decisions. (Compare *The Beta*, L. R., 2 P. C. 447, *The Guldfoze*, L. R., 2 A. and E. 325, *The Explorer*, L. R., 3 A. and E. 289, *The Franconia*, 2 P. D. 163, on the one side, with *Smith v. Brown*, L. R., 6 Q. B. 729, and *The Vera Cruz*, (No. 2), 9 P. D. 96, on the other.) In *Seward v. The Vera Cruz*, the House of Lords affirm the decision of the Court of Appeal, but this does not affect the consideration that the existence of a double appeal has rendered the law deplorably uncertain, and a comparison of *The Beta*, L. R., 2 P. C. 447, with *Seward v. The Vera Cruz*, suggests that the anomaly of maintaining two Courts of Final Appeal makes the attainment of absolute certainty as to the simplest rules of law an impossibility.

*Attorney-General for Quebec v. Reed*, 10 App. Cas. 141. This case is one of those decisions which suggest political justifications for

the maintenance of a legally indefensible anomaly. We may well doubt whether the Colonies would allow any tribunal called the House of Lords to adjudicate on such a matter as is in this instance determined by the P. C. That Court performs for the Dominion of Canada the functions discharged in the United States by the Supreme Court. They have now decided that a duty of ten cents imposed upon every exhibit filed in Court in any action depending therein is a form of indirect taxation, and that therefore the imposition of such a duty is *ultra vires* of the Provincial Legislature of Quebec; in other words the P. C. has determined just that kind of question which under a federal system of government raises the question of State rights, and therefore gives rise to the most violent political controversies. The decision will no doubt be quietly accepted throughout the Dominion, though it is open to question whether the views of the Judicial Committee on the line dividing direct from indirect taxation would command the assent of all political economists.

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*Last v. London Assurance Corporation*, 14 Q. B. D. (C. A.) 239, raises a point of some nicety and also of considerable interest to life assurance companies. The London Assurance Corporation distributes the annual earnings of the company partly as dividend divisible among shareholders and partly as bonuses payable to policy holders. The corporation claim that the amounts payable by way of bonus are not profits of the company but moneys expended to earn profits, and are therefore not liable to income tax. This view has been maintained first by the Queen's Bench Division and next by the C. A. If held by the H. L. it will enable life assurance companies to escape to a great extent from payment of income tax. Its correctness however is doubtful. Mr. Justice A. L. Smith dissented from the judgment of the Q. B. D. and Lord Justice Lindley from that of the C. A. There is some difficulty in seeing how moneys, the existence of which depends wholly upon the excess of income over expenditure, can cease to be 'profits' because they are divided among policy holders instead of going to shareholders.

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Legal logic does not receive half the attention it deserves either from logicians or from lawyers. Every number of the Law Reports contains cases in illustration of logical problems, and the riddles which perplex the Courts might be much simplified by attention to the elements of logic.

Thus the Judges have within the last quarter been more than once occupied with attempts to define what is meant by a cause of action, and have thus unconsciously perhaps been involved in the attempt to give a practical answer to the enquiries raised by Mill's chapter on the law of Causation.

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*Alderton v. Archer*, 14 Q. B. D. 1, in effect raises the point whether the cause of action against a vendee under an agreement for the sale

of a lease depends upon the signature of the agreement by the purchaser, or also depends upon the signature of the counterpart agreement by the vendor. In the case in question the vendee signed a copy of the agreement in Middlesex, whereas the vendor signed the counterpart in the City of London. The latter signature was the only part of the whole transaction which took place in the City, and the vendor claimed a right to sue in the Mayor's Court on the ground that 'the cause of action' arose wholly or in part within the City of London. The Court held that the signature by the vendor was not part of the cause of action against the vendee, and that therefore no part of it arose within the City of London, and, as a consequence, that an action was not maintainable in the Mayor's Court. This decision was, we conceive, correct, but readers should note that the Judges were not called upon to decide whether the breach of a contract does or does not of itself constitute a cause of action. This should be noticed because cases such as *Vaughan v. Weldon*, L. R., 10 C. P. 47, or *Jackson v. Spittall*, L. R., 5 C. P. 542, suggest an idea that cause of action means part and not the whole of the facts giving rise to a right of action. This doctrine is logically and, we are inclined to believe, legally untenable.

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The cases of *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. D. 125, and *Brunsdon v. Humphrey*, 14 Q. B. D. 141, decided by the Court of Appeal in July (why not sooner reported?), are both of great interest with regard to the principles of the same kind which underlie apparently technical questions, and which, since the abolition of the forms of pleading that disguised them in our old practice, have to be fully and boldly discussed. In the former case the Court carries out the principle that it is not in itself a wrong to do something on one's own land which may have the effect of letting down a neighbour's adjacent or superjacent land or buildings: not only a wrong and a cause of action arise only when a subsidence actually takes place (as was settled in *Backhouse v. Bonomi*, 9 H. L. C. 503), but every distinct subsidence is a new cause of action (overruling *Lamb v. Walker*, 3 Q. B. D. 389, in accordance with the dissenting judgment of Cockburn C.J.). This is quite in harmony with the doctrine of another class of cases not mentioned in the argument—those of which *Rylands v. Fletcher* (L. R., 3 H. L. 330) is the leading authority. It is not wrongful to keep water in an artificial reservoir, or fire in a traction engine, but if and when they escape and do damage (unless from certain excepted causes) the owner is liable; and every such event would undoubtedly be a fresh cause of action.

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*Brunsdon v. Humphrey* is a case (really of first impression, it would seem) of distinct injuries to the same party by one and the same wrongful act, for which, beyond question, damages might have been recovered in one action. The doubt was whether distinct actions would lie. Whether injury to the person is a generically different harm from damage to goods is an inquiry which goes rather behind

the ordinary grounds and reasons of the law; though, as Bowen L.J. pointed out, the historical distinction of the forms of action is capable of throwing much light upon it. We may add to the authorities collected in the Lord Justice's learned judgment one passage showing by the strongest evidence—that of a settled technical distinction—that the Roman lawyers thought the right of personal safety essentially different from the right to safe enjoyment of one's goods: 'Liber homo suo nomine utilem Aquiliae habet actionem: directam enim non habet, quoniam dominus membrorum suorum nemo videtur.' Ulpian in D. ix. 2. ad legem Aquiliam, 13 pr.

Lord Coleridge's view is put as well as it can be put in these words: 'That the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different rights, i. e. his person and his goods, I do not in the least deny. But it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg. but that he can bring two if besides his arm and his leg being injured his trousers which contain his leg... have been torn.' But this argument, though very telling, seems fallacious. A blow or a shot which hurts both a man's hands does double damage, but is only a single injury, i. e. it is the invasion of the one right not to have one's body injured; the breaking of a man's leg and the tearing of his trousers, or the breaking of his hand and the destruction of a diamond ring on his finger, is an interference with two rights, and there is no palpable absurdity in saying that interference with two rights must always give rise to two rights of action.

*The Attorney-General of Duchy of Lancaster v. Duke of Devonshire*, 14 Q. B. D. 195, determines a matter which appears to be of no great practical importance to any one but the Attorney-General for the Duchy. It is difficult to see that it greatly matters to an offender who may be the official in whose name an information is filed. But the case has considerable antiquarian interest, and illustrates the way in which in England legal and historical enquiries run into each other. It is certainly an odd thing that a case decided in 1884 should in any way turn upon the Year Book 22 Edward III, 3 b, or upon the position and rights of Sir Richard Empson, Attorney-General for the Duchy, under Edward the Fourth.

In *Hodkinson v. N. W. Ry. Co.*, 14 Q. B. D. 228, it has been held that a railway porter is not the Company's servant for the purpose of taking the temporary custody of luggage after it has been claimed by a passenger; not on the ground of any special term or condition in the Company's contract, but because the contract was fully performed by the delivering the luggage on the platform and the tender of the porter's services to put it on a cab. *Patscheider v. G. W. Ry. Co.*, 3 Ex. D. 153, is said by the Court to be clearly distinguishable, but the distinction is rather fine.

*Wellon v. De Bathe*, 14 Q. B. D. 339, decides that a married woman in sole occupation of a house bought by her own earnings since

the Married Women's Property Act, 1870, can bring an action of trespass alone without her husband against a wrongdoer who enters her house against her will, even though the entry is authorised by the husband. The decision is noteworthy in itself, but its main importance lies in the evidence which it affords of determination on the part of the judges to give full effect to the Married Women's Property Act. It is quite clear that henceforth a married woman will for all practical purposes have the same property rights as a feme sole. That this should be so is an outward sign of a revolution in public opinion as marked as any which has occurred within the last thirty years.

*Reg. v. Dudley and Stephens* (the 'Mignonette' case) is reported, 14 Q. B. D. 273. The argument for the defence appears to us capable of a somewhat more formal *reductio ad absurdum* than the Court thought it worth while to undertake.

It was not contended that the person killed under circumstances of so-called necessity would not be justified in resisting. Now, if resistance is justifiable at all, it is justifiable even to the infliction of death when one's own life is at stake. Therefore we should have a state of things in which A is not punishable for killing B, nor yet B for killing A if he cannot otherwise prevent A from killing him. But to say that A may kill B if he can, and also that B may kill A if he can, is to deny the existence of any law at all.

The note supplied by Grove J., 14 Q. B. D. at p. 288, is ingenious: 'If the two accused men were justified in killing Parker, then, if not rescued in time, two of the three survivors would be justified in killing the third, and of the two who remained the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving.' But is there not a touch of sophistry in it? If the possibility of justification is once admitted, every case must be separately considered with regard to the probabilities apparent to the actor at the time of the act done.

*Brewer v. Brown*, 28 Ch. D. 309, is a pretty plain case of a misleading statement in particulars of sale entitling the purchaser to rescind. As it was decided in the third week in November, one might think time had been taken to consider whether the case deserved a full report; but as the March issue of the Law Reports also contains cases decided as far back as June last, we suppose this is a mere accident.

*Smith v. Land and House Property Corporation, C. A.*, 28 Ch. D. 7, is a less obvious and more interesting case of the same class.

Another unsuccessful attempt to escape the responsibility created by the Employers' Liability Act, 1880, is recorded in *Millward v.*

*Midland Ry. Co.*, 14 Q. B. D. 68. We cannot blame the Company's advisers for taking the case to the superior court: when a statute is framed in such a manner as to invite litigation people cannot be expected to acquiesce without dispute in its application against themselves. But the Court's refusal of leave to appeal is not the less to be commended.

WE have from a learned American contributor the following note of a case referred to at the end of the Editor's article in this number:—

*Chicago, Milwaukee, &c. Ry. Co. v. Ross*, 19 Reporter, 97, Supreme Court U. S., December Term, 1884.

The plaintiff was engineer of a freight train, which collided with a gravel train by reason of the failure of the conductor of the freight train to give him information of the coming of the gravel train. The conductor had the necessary information in time to deliver it (as it was his duty to do, by express regulation) to the plaintiff, and his failure so to deliver it was due to his own negligence. The plaintiff sustained damage by reason of this negligence. Held, that the defendant, common employer of the engineer and the conductor, was liable; four Judges dissenting. Field J., who delivered the lengthy opinion of the Court, thought that a conductor 'having the entire control and management of a railway train' could not be treated as a fellow-servant of an engineer on the same train; he *represented* the company. 'We agree with them [the Courts of Ohio and of Kentucky],' said he, 'in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible.'

The dissenting Judges (Matthews, Gray, Blatchford, and Bradley, JJ.), by Bradley J., said: 'We think that the conductor of the railroad train in this case was a fellow-servant of the railroad company with the other employees on the train.'

The following are the Ohio and Kentucky cases referred to: *Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Railroad Co. v. Keary*, 3 Ohio St. 201; *Louisville & N. R. Co. v. Collins*, 2 Duvall, 114.

[It will be observed that the American conductor has much larger powers than the British guard: but even so the decision of the Court is clearly in conflict with the English cases confirmed by *Wilson v. Merry*, L. R., 1 Sc. and D. 326. Our own opinion is that in *Wilson v. Merry* the House of Lords threw away a great opportunity of improving the law. At the moment of going to press we have seen a full report in the 'American Law Register' for February (vol. 24, p. 94; S. C. 13 Amer. Law Record, 513). It appears that the conductors of both trains were in fault. The



opinion delivered by Field J., while assuming the doctrine that a servant takes upon himself all ordinary risks to be a settled part of the Common Law, doubts its policy.]

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In *Commonwealth v. Pierce* (Supreme Court, Massachusetts; 24 Amer. Law Register, 117), a case of manslaughter by unskilful medical treatment, O. W. Holmes J. has given a judicial exposition of the doctrine of the 'external standard' of a prudent man's conduct already familiar to readers of his lectures on the Common Law. He cites *Vaughan v. Menlove*, 3 Bing. N. C. 468, an important case too little noticed by the text-books, where the contention that a man is bound only to act to the best of his own judgment, such as that may be, was decisively rejected by the Court of Common Pleas.

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## CONTENTS OF EXCHANGES.

(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

*The Canadian Law Times.* Ed. by E. DOUGLAS ARMOUR. Vol. V, No. 1, Jan. 1885. Toronto: Carswell & Co.

Powers of Sale in Mortgages—To the Memory of James Bethune, Q.C.—Editorial Notes, Reviews, etc.

*The American Law Register.* N.S., Vol. 24, No. 2, Feb. 1885. Philadelphia: Canfield & Co.

Reformation in Equity of Contracts void under Statute of Frauds, by H. Campbell Black—Reports with Notes, Abstracts of Decisions.

*The American Law Record.* Vol. 13, No. 9, March, 1885. Cincinnati: Block Publishing Co.

Reports in Supreme Courts, U. S. and States—Current Items—Digest—Book notices.

*Bulletin de la Société de Législation Comparée.* (Paris), 16<sup>me</sup> Année. No. 1, Jan. 1885; No. 2, Feb. 1885.

No. 1. Reports and Transactions—Danish and Norwegian Bankruptcy Law, L. Beauchet—Elections in United States, R. Millet—Belgian and French legislation—Reviews.

No. 2. Religious elements in American law (Cantel)—Proportional representation in Scandinavian lands (P. Dareste)—Legislation in Spain and Portugal—Reviews.

*Revue de Droit International et de Législation Comparée.* Vol. 17, No. 1. Brussels and Leipsic, 1885.

Civilisés et barbares, J. Hornung—Des hostilités sans déclaration de guerre, Féraud-Giraud—Le désarmement proportionnel, J. Lorimer—Du conflit des lois en matière d'obligation alimentaire, L. Olivi—etc.: literary notes, reports, reviews, etc. Vol. 16 (for 1884) is announced as complete.

*Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart.* Vol. 12, Part 2. Vienna, 1885.

Verbrauch der Strafklage nach deutschem Strafprocessrecht (Julius Glaser)—*Emptio rei speratae* u. *Emptio spei* (Fr. Endemann)—Löschung von Hypotheken nach österr. Recht (H. Krasnopolski)—and many book reviews.

*Centralblatt für Rechtswissenschaft.* Vol. 4, Part 3, Dec. 1884. Stuttgart.

This journal is wholly devoted to reviews and bibliography. Among the books noticed the following are of specially English interest: V. Mayer, Thomas Hobbes, Darstellung u. Kritik, &c., Freiburg 1884, described as 'klar und verständlich, fast populär gehalten'; J. C. Reed, American Law Studies, Boston, 1882, 'nach allen Richtungen eine interessante Erscheinung'; M. Lush, Law of Husband and Wife.

*Archivio Giuridico.* Vol. 34, No. 1. Pisa, 1885.

Tango—Contabilità di Stato: Cantarelli—The date of the Lex Iunia Norbana: Rinaldi—On certain questions of preference between creditors: Lordi—Questions under art. 819 of the Civil Code: Buonamici—Letter on a new, apparently very bad, edition of the Institutes—Reviews.

*Rassegna di Diritto Commerciale Italiano e Straniero.* Vol. 2, No. 5, Jan. 1885. Turin.

Dove Wilson—Codification of British Commercial Law: E. Adan—The contract of life assurance: Santoni de Sio—La Cambiale in fiera (posthumous): Salvatore Sacerdote—Should brokers need a licence? Book notices—Reports of cases—Translation of English Bankruptcy Act, 1883, concluded.

*Il Filangieri: Rivista Giuridica Italiana di Scienza, Legislazione e Giurisprudenza.* Part 1, Jan. 1885. Naples.

Celestino Summonte—Reform of local Government: Manara—Special conditions in contracts of carriage: Napodano—Draft Penal Code: Vivante—Agents of insurance companies: Reviews. The Editor (Prof. Alberto Marghieri) announces that in future numbers reports will appear of cases decided in all the superior Courts of Italy.

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The Contents of Number III of the LAW QUARTERLY REVIEW (to be published on July 1) will probably include:—

*Some Results of the Judicature Acts.* By Lord Justice BOWEN.

*The Position of the Legal Profession.* By E. S. ROSCOE.

*Agreement in Contract.* By Prof. T. E. HOLLAND.

*The Law of Insurance.* By A. COHEN, Q.C., M.P.

*The Seisin of Chattels.* By F. W. MAITLAND.

*A Difficulty in the Doctrine of Consideration.* By Dr. E. GRUEBER.

*Mistake of Law as a Ground of Equitable Relief.* By MELVILLE M. BIGELOW.

*Justice in Egypt.* By HAROLD A. PERRY.

*Digest of Cases.* By EDWARD MANSON.

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*The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.*

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# THE LAW QUARTERLY REVIEW.

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No. III. July, 1885.

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## THE LAW REPORTS.

**T**HE Law Reports are now in the twentieth year of a fairly prosperous career. Their history has been well and fully written by Mr. Daniel, to whose energetic initiative the scheme owed its existence. A thoughtful paper on the principles which should govern the conduct of such a publication has lately appeared in the pages of this REVIEW from the pen of a learned Judge who himself contributed largely to the early success of an enterprise which timid men had regarded as over-hazardous, and even the most sanguine had felt to be full of difficulty. After this little need be added, and yet there is something which ought not to be left unsaid.

Every piece of arduous work may be looked at from within or from without—from the point of view of the worker or of the spectator. The actual experience of those whose duty it has been to produce the Reports may perhaps supply a useful supplement to the most perfect ideal. It has been my task since the commencement of the Law Reports to direct the labours of about one-half of the Staff. I should like to mention a few things which in that capacity I have had forced upon my attention, and this with special reference to Lord Justice Lindley's pregnant suggestions.

The principal requirements which would satisfy what I understand to be his ideal may be thus summarised:—

1. The Law Reports should attain such a standard as to drive out of the market the Law Journal, Weekly Reporter, and Law Times.
2. Reports should be accurate, should contain everything in statement, argument, and judgment which is material and useful, and should be as concise as may be consistently with these requirements.
3. Excessive bulk should be avoided by including only cases which—
  - (a) Introduce or appear to introduce a new principle or rule;
  - (b) Materially modify a principle or rule;
  - (c) Settle or tend to settle a doubtful question of law;

- (d) Are for other reasons peculiarly instructive :  
these suggestions being qualified by the observations—
  - (e) That construction cases should be excluded 'unless there is good reason for including them;' but that it is a good reason if they deal with common forms, with general Acts of Parliament, with Rules of Court, or with unsettled practice;
  - (f) That it is better to report than to omit a doubtful case.
4. Judgments (even when written) should be shortened by omitting everything which (though relating to the matter decided) may not be worth reporting.
5. Reports should be published with as much speed as practicable consistently with other requirements.
6. The periodic Digests should be Digests of legal principles rather than Digests of cases.

To this enumeration of principles the Lord Justice adds a not obscure intimation that the speed attained by the Staff is far short of what it might be, and that the Digests are not only defective in detail, but are constructed on a false basis and with a mistaken aim.

Both out of deference to so high an authority and in justice to the Staff of Reporters I feel bound to deal fully with these censures, and I do not in the least despair of convincing a critic so eminently fair-minded as Lord Justice Lindley that, from lack of information about the details of the work, he has not fully appreciated the time which must necessarily elapse between the decision and the report of a case. The other complaint about the Digest concerns the Council rather than the Staff, but on that also there are some facts to be weighed which do not appear to have been present to the mind of the Lord Justice.

But before discussing in detail any supposed shortcomings of the Executive Council or Staff in giving effect to the conditions prescribed, I have a few considerations to suggest upon the conditions themselves. I will take them in order.

1. The first condition assumes that it is desirable that the Law Reports should enjoy a practical monopoly, and further, that if they were perfect in all respects, the rival publications would cease to exist. I have a doubt about the first of these propositions; and very much more than a doubt about the second.

The chief advantage of a monopoly is that it renders it much more easy to reject cases of little value. On the other hand, the stimulus of competition may have a wholesome influence on this as on every other department of work. Which way the balance of good may incline is not perhaps quite easy to determine off-hand. But assuming Lord Justice Lindley to be right in aiming at the total extinction of all rival reports, I believe he is mistaken in

supposing that even ideal excellence in the Law Reports would lead to that result. It is much more a matter of price than of quality. If our Reports were sufficiently cheap for the purpose, they might perhaps destroy the Law Journal, should that be thought desirable; and it may be that the recent reduction of the price of the Law Reports will seriously cripple that publication. But no amount of excellence and cheapness combined could affect the Law Times, because that print is a flourishing newspaper of which the Reports are a mere subordinate adjunct. The same considerations would very likely save the Weekly Reporter.

Further, if it were made a paramount object to get rid of rival Reports, it would be necessary, for a time at any rate, not to improve but to deteriorate our own Reports. We should have, for the sake of commercial competition, to print almost everything which they published, and to give full shorthand notes of judgments whenever they did. If this were not done the Law Journal would constantly be brought into Court, and if wanted for that purpose would certainly be purchased. It may well be questioned whether the advantage, if it is an advantage, of destroying a rival might not be gained at too great a cost.

2, 3. With respect to the second and third conditions, I have little to say beyond expressing my respectful admiration of the rules which the Lord Justice has propounded. It is to be observed, however, that in these, as in kindred matters, the difficulty is less in laying down principles than in applying them to particular cases. Thus the sweeping inclusion of all cases 'which are for any reason peculiarly instructive' (though not only wise but absolutely essential) fails to afford any very precise guidance. The same vagueness is unavoidably present in the maxim that it is better to report too many cases than too few; and though the classification of constructive cases is admirably clear, and if I may presume to say so unquestionably sound, a rule of exclusion qualified by the exception 'unless there is good reason for including them' leaves a very large, and no doubt a necessarily large, margin for discretion. In practice, the way in which this discretion has to be exercised depends much more upon the Bench than upon the executive Staff of the Reports. Of late years Judges have happily set their faces against the citation of cases turning upon obscure sentences in wills, and have made it possible to consign to the waste-paper basket many decisions which the reporters of fifty years ago would have felt bound to print. But the Courts have certainly not yet gone the length of discarding authorities which establish definite canons of construction, and until they do so every fresh judgment which distinctly qualifies a recognised canon must find its place in the

pages of the Reports consistently with the rules which the Lord Justice prescribes. Still, notwithstanding the existence of varying shades of judicial opinion on the subject such as are to be found in many cases, for example, in *Re Bedson's Trusts*, 28 C. D. 523, the tendency is so plainly in the direction pointed out by Lord Justice Lindley that it has become every year possible to reject a larger proportion of construction cases, and we may hope soon to be able to reduce the number printed within yet narrower limits. The only restriction on that wholesale slaughter of will cases in which I for one should like to indulge seems to me to be this—that in these matters Reporters must follow and not try to lead the Courts. I remember falling into the error of premature reform by rejecting a case some years ago before the now prevailing view was sufficiently matured to warrant its condemnation. It was a construction case which I might now perhaps safely cast aside; and I was encouraged to do so then by the wholesome scorn with which the presiding Judge had referred to the bead-roll of authorities which had been cited on a mere question of construction. The decision was reported in the Law Journal, and whenever the subject cropped up again I had the mortification of seeing this Law Journal report not only cited but respectfully discussed by the Court, teaching me that my reforming zeal had gone ahead too fast. I do not doubt that we may properly reject many cases which, if printed by us or others, Counsel would try to cite, but we should not presume to blot out an authority which the Courts would deem worthy of serious consideration if it were cited before them on an analogous question. That is the test which we have endeavoured to apply, making mistakes occasionally like other fallible human beings, and governed always by the Lord Justice's general rule to lean in doubtful cases to the side of admission rather than rejection.

4. The fourth condition is one which, if it could be made feasible, would add more than anything else to the compactness and convenience of the Reports. But it can only become practicable with the express sanction of every Judge on the Bench. No doubt Lord Justice Lindley is quite right in saying that oral judgments will generally admit of improvement by vigorous condensation and careful revision, and he is possibly right in thinking that even written judgments may in some cases admit of compression. Few men were greater masters of polished diction than Lord Westbury; no style could well be more terse and graphic than Vice-Chancellor Bacon's. And yet I have heard each of them say that a mere shorthand note of his judgment might with advantage be pruned and condensed before publication. But Reporters cannot presume to do this on the scale which Lord Justice Lindley seems to contemplate

unless with the express sanction and almost at the express request of the Judge himself. No modern Reporter I believe ever used as much freedom in condensing and re-writing judgments as I was in the habit of using when I reported in the Court of Vice-Chancellor Page-Wood; but then I had his warm approval, and I was responsible to no one else. So far as I prudently could I have urged the Reporters in this direction, but, without being assured that the Bench desired it, I could not encourage them to introduce more than a very trifling measure of compression and emendation. Even to the small extent which I thought permissible I have found no great alacrity on the part of the Staff to avail themselves of a legitimate liberty in this respect. The safer practice of relying on verbatim notes seems to have attractions too powerful to be overcome. Some of the Reporters I have no doubt possess both the courage and the literary aptitude to undertake the duty, and I know that they would all loyally attempt it if called upon to do so; but it is not very easy to modify language without losing, or perhaps even distorting, some portion of the thought expressed, and occasional errors might very likely occur which would need indulgent and generous consideration. But it is premature to discuss the difficulty of the task until there is more reason than at present to suppose that such a practice would be approved or permitted. Take a case of daily occurrence, where the several members of a Court give judgments in entire agreement with one another, but expressed in very different language and adorned by very various illustrations. Is it desirable that the Reporter should, for the sake of brevity, give a condensed, even if it were an improved version of one judgment, and omit large portions of the others as being substantially to the same effect? No reporter could possibly take such a liberty as this unless it were perfectly understood that the Judges wished it. And I have no reason at present to believe that the Judges as a body do wish it, nor, so far as I can see, have we any right to expect that they should. As it is, we do obtain from the kindness of the Judges very valuable and sometimes very extensive emendations of their reported language, and I cannot help thinking that the readers of the Reports should be content to dispense with further alterations, except of course the correction of mere verbal slips and printer's errors.

5. The fifth condition is obviously right, but it raises the question whether the amount of speed which it exacts has or has not been attained. Of course, no one would insist upon the utmost possible speed without regard to excellence in other respects. If the maximum of speed were thought worth securing at the risk of some considerable sacrifice of accuracy the average interval between



decision and publication might probably be shortened by several weeks, but few persons—and I feel sure that Lord Justice Lindley would not be one of them—would doubt that it is better to have a good report a little later than a bad one a little earlier. The real question is whether, having regard to all the requirements of ideally perfect Reports, the Staff have fallen short of the speed which can be reasonably exacted under the actual conditions of their work.

This is merely a matter of arithmetic, and I will deal with it so far as relates to the Chancery Division, as to which alone I can speak from actual knowledge.

The first step is to ascertain what is the interval which must elapse between decision and publication at a favourable time of year, and in the absence of any special causes of delay.

The rules of the Council allow the Reporters three weeks after a decision to prepare their reports, with such further time as may be rendered necessary by special circumstances. A week is all that I ask in ordinary cases for the first reading of the copy in order to determine whether it is fit to be printed substantially as it stands, and about another week at later stages for the final revision of the proof and the incorporation of the Reporters' and the Judges' alterations.

The printers send out the first proof on an average in rather less than a week, and they require for the final correction of the proofs, for printing, drying, folding, and delivering, about a fortnight after the first part of the monthly batch is sent in for press. This can scarcely be thought an unreasonable allowance of time for work so admirably careful as that of Messrs. Clowes has always been; nor could it be much shortened without recourse to night-work, which is very costly. The Judges have about a week for revision, but as the proof-sheets are sent to them in monthly batches, each proof has to wait till the batch is complete, and the whole time absorbed for judicial revision therefore varies from one week to over five, according to the period of the month when the report is received, the average time being a trifle more than three weeks.

Approximately therefore the account of time stands thus:—

Reporters and Editor	.	.	5 weeks.
Printers	.	.	nearly 3 weeks.
Judicial revision	.	.	fully 3 weeks.
Normal average interval	.	.	11 weeks.

Special circumstances which cause delay are:—

1. Absence of Judges, and consequent delay in getting revised proofs.
2. Delay in obtaining the necessary papers and short-hand notes, and sometimes in waiting for the minutes of the judgments.

3. Occasional necessity of borrowing papers a second time to correct defects discovered by Editor.
4. Excessive pressure of business with which the Reporters cannot keep pace.

Of these, the first is rare in term time; the second is a reason constantly assigned by the Reporters for being in arrear, and is I believe accountable for considerable loss of time in many cases; the third, though not frequent, is an important cause of delay when defects of statement are discovered which the Reporter cannot correct without a second recourse to the papers; the fourth occurs only in the Appeal Court, and has been the cause of appreciable delay there, which the Council have now met by putting additional strength into the Court. The delays of this character are often very long when they do occur, though they happen only in a small minority of cases, and it is a little difficult to say what would be a reasonable allowance for them, but, speaking roughly, I should think that an average of about a week would be a fair estimate in term time. This would bring the average interval to twelve weeks, which has not I think been appreciably exceeded.

This calculation applies to all cases except those which are too late to be passed through the Judges' hands in the beginning of August. These include all the August and nearly all the July decisions, together with a few cases decided in June and May which have been specially delayed. This year the numbers were twelve of August, twenty-three of July, six of June, and two of May. All these of necessity have to wait for judicial revision until the end of October, so that the whole time absorbed on this account is nearly three months instead of three weeks, and publication cannot take place before December. There is no possible escape from this loss of time so long as we continue to enjoy the assistance of the Judges, and I do not believe that any one would think it desirable to sacrifice this great advantage for the sake of getting a certain number of cases published in the long vacation instead of at the end of the year.

The broad result is that the average time taken up by the printers and for judicial revision varies from nearly six weeks in term time to three or four months in the long vacation, a fact which was obviously not before Lord Justice Lindley's mind. There remain for the whole work of the Reporters and Editor, in a normal case, average intervals of three and two weeks, with an average allowance of one week for contingencies. The five weeks are the only period out of which time can be squeezed. It might perhaps be possible by great pressure to save a week or so, but I doubt whether even that trifling increase in the average speed of the

work could be exacted without risk of impairing the quality of the Reports, and any substantial acceleration is a physical impossibility while existing conditions are retained. After all (if, *pace* Mr. Goschen, I may use the expression), speed, though important, comes second to accuracy. In justice to the Staff I hope I may be allowed to quote from a letter of the Master of the Rolls (written long before Lord Justice Lindley's article and not the first of its kind) these few words: 'I must again express my admiration and thanks for the care and skill of the Reporters.' It would hardly be worth while, by excessive hurrying, to risk the loss of such commendation.

I am afraid that my arithmetical details will have been found insufferably tedious, but as I know of no working body of men of any grade, from the highest to the lowest, whose average margin of avoidable delay has been smaller than that of my staff of reporters, I feel that I should have failed in what I owe to them if I had not done my utmost to relieve them from an imputation of negligence which I do not think they deserve.

6. It remains only to deal with a subject of more interest than the counting of weeks and days—the principle on which the periodic Digests of the Council should be constructed. The Lord Justice's view is that the Council should publish digests of legal principle modelled on the pattern of Comyn's Digest in place of the Indexes of Cases which they are in the habit of issuing under the name of Digests.

It is rather unfortunate that such a designation should have been adopted, but the fashion of calling a comprehensive Index a Digest was set by Harrison in his Common Law Digest, and followed by his successors Fisher and others, although Chitty in compiling a corresponding work was content to give it the less pretentious and more accurate title of an Equity Index.

A Digest is not merely a superlative Index. An Index is by no means an imperfect Digest. They are two essentially different things, each capable of perfection in its own kind, but neither capable of adequately fulfilling the purposes of the other.

A Digest of principles is a summary of the whole law scientifically arranged. An Index of cases is a dictionary arranged with a view to facility of reference. The Digest is the book to be consulted by one who wishes to learn law. The Index is the work to be used by one who wishes to hunt up a case. Scientific arrangement is essential to the one, alphabetical arrangement is indispensable for the other.

No single work can fully combine the objects of both, because the systems of arrangement are incompatible. The leading idea of an Index is facility of reference, which demands alphabetical progression in every class and sub-class into which the subject may

be grouped. The leading idea of a Digest is scientific order, which demands a regular progression based on subject-matter.

No ingenuity will make the natural progression of topics accord with the artificial progression of the letters of the alphabet.

If you desire all the advantages offered by Digests and Indexes you must have both as separate works—the Digest to teach the student and guide the jurist, the Index to help the practitioner to find the case he is looking for, without needless waste of time.

The Digest of course is beyond all comparison the higher product of the two, but the Index is an indispensable necessity in the conduct of business.

It was a primary duty of the Council to supply the best Index they could produce to the library of volumes which they found so rapidly growing under their hands. Whether at any future time they may be able to add to this a Digest worthy of the age is quite another question; but even if they had contemplated this possibility, it would surely have been a mistake either to postpone the much-needed Index or to impair its efficiency as an Index by giving it something of the air of a spurious Digest.

Whether it ever will be practicable for the Council to bring out a really good Digest, and if ever, whether within any reasonable time, it is not easy to say. Lord Justice Lindley mentions Comyn's Digest as a worthy example. No doubt it is, though far from perfect or complete, but how was it produced? Let his literary executors and editors tell us: 'The whole of this laborious work is the result of many years' application of the learned Judge whose name it bears.' And further on they say that it was 'all written with his own hand.' For twenty years and more after Chief Baron Comyn's death his editors pursued their labours in translating the French into English and verifying every quotation and reference. It is not at all improbable that the great work which appeared in 1762 had been commenced half a century before. It proves no doubt that the long-continued labour of a single mind of exceptional power may produce a really valuable Digest. And the failure of so many other attempts of the same kind seems to show that without some such specially favourable conditions, a repetition of the old Judge's measure of success is scarcely to be hoped for. It is not even necessary to look beyond the book itself to realise the exceeding difficulty of such a task and the amount of time and skill and toil which it demands; for with all its merits, and after all the labour spent upon it, Comyn's great work is far from being an exhaustive Digest of the whole law, and still further from being either a complete or a handy Index to the then existing cases of importance.

The time occupied may no doubt be reduced by multiplying

workers, but you cannot do this with impunity. Half the excellence of Comyn's work was probably due to the fact that he did it all himself. Even if it were practicable to commit a similar undertaking to the hands of a man as able and learned as Comyn and to give him the selection of an unlimited staff of subordinates who should be sympathetically subdued to his views, you could not fairly expect the consistent harmonious results which flow naturally from the continuous leisurely thought of a single mind.

Something of a less perfect kind might no doubt be produced by such machinery, and perhaps, if cost were disregarded, within a moderate number of years, but is it an undertaking on which the Council could prudently venture? Is it a duty which they can be reproached for neglecting? Lord Justice Lindley will certainly remember the strong effort that was made when Lord Cranworth was Chancellor to produce a Digest of English Law. A commission was appointed of the most eminent judges and lawyers of the day. An excellent Report was issued, the burden of which was that the project was feasible but that the services of a very costly staff would be required for some years, and the total expenditure foreshadowed was so formidable that the commissioners did not venture to ask the Government at once to sanction it.

As a less expensive alternative, they suggested the preparation in the first instance of trial Digests of a few isolated branches of law. The experiment was made, but ultimately collapsed from causes which need not be discussed, leaving as the net result of the commission a not inconsiderable outlay and no Digest at all.

It may be that at some future time the enterprise will be renewed with better success, but it will need to be backed by resources far beyond those at the command of the Council of Law Reporting.

Assuming that, for the present at any rate, the Council must leave Digests alone and content themselves with the much easier task of producing Indexes, it is no doubt very important that these should be as good for purposes of reference as Indexes can be made.

Lord Justice Lindley thinks that, even as Indexes, the Law Report Digests might be substantially improved, and has offered some valuable suggestions for that purpose. I not only believe that they can be improved, but I confidently hope that before long they will be, and I think it is possible to indicate the lines on which such improvement should march. I am afraid that in the general scheme on which these Digests are constructed, as well as in the specific details of classification, the one leading idea, *facility of reference*, has not always been kept in view as distinctly as it should be.

This is not the place to discuss minute details of Index construction, but I believe that the time required in consulting the so-called

Digest might be considerably diminished and absolute certainty of finding the case sought for more nearly approached if alphabetical arrangement were carried much further into subordinate classes than is now done, and if the searcher were relieved—as he might be on a different scheme of classification—from the task of roving through long lists of head-notes, sometimes extending over many pages. Any one who looks for a case on a point of practice will know what labour this means.

As a matter of fact, the importance of avoiding defects of this character was recognised in the early days of the Reports by a Committee of the Council of which Mr. Markham (afterwards Lord Justice) Giffard was an active member, and a project of Indexing was very carefully elaborated with this view. But a practical difficulty has arisen from the fact that periodic Digests had long been in use, which, though very serviceable and valuable works, were not free from the defects which it was desired to remove, and it seems afterwards to have been thought better to avoid the introduction of novelties which would disturb old habits, even at the cost of perpetuating faulty methods of arrangement. In the result the Law Report Digests have been for some years constructed in almost slavish imitation of the well-known Harrison's and Fisher's Digests. Whether a bolder course might not have been and might not now be wiser is a matter on which opinions will probably differ, but critics of the Council's work will I am sure bear in mind that some at least of the faults which they detect in the Digests are a *damnosa hereditas* which has descended upon them from earlier times. One other improvement, to which too great value can scarcely be attached, would be to place the Indexing work absolutely under the control of a single mind. The Digester should in the first instance be allowed to revise every catch-word in the Reports, so as to bring it into working correspondence with his own scheme of titles. And if the whole work is more than one man can do, as it probably is, the utmost care should be taken in the selection of titles to avoid (what I think may now be detected) the occasional clashing of different minds working in different grooves. The simplest way of effecting this, if such an indulgence were thought otherwise admissible, would be to authorise the chief Digester to select for himself assistants whom he might find capable of working in perfect subordination to his ideas. By developing some such improvements as these I believe it would be found possible to produce periodic Indexes more nearly approaching Lord Justice Lindley's standard, and, speaking for myself only, I am very hopeful that this will be done.

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G. W. HEMMING.

## MISTAKE OF LAW AS A GROUND OF EQUITABLE RELIEF<sup>1</sup>.

**F**EW subjects of the law present, at first reading of the judicial authorities, so small an attempt at the expression of a pervading principle as the subject of Mistake. The fact has been more embarrassing no doubt, as has been suggested<sup>2</sup>, to the student than to the practising lawyer; but the latter too finds his difficulties in the mass of undigested cases on the subject. Much has indeed been done of late towards reducing this mass to order<sup>3</sup>, but not a little remains undone. The underlying principles of relief, while seldom if ever sufficiently enunciated by the Courts, are reasonably clear, so far at least as the question of relief for mistake of fact is concerned, and, as I think, of relief for mistake of law as well. These principles, in their relation to contract, may be formulated into the following propositions:—

1. Relief for mistake either in equity or by an equitable plea at law is based on mistake in regard to matter of the agreement, as distinguished from mistake in respect of the inducements thereto, or in regard to some condition precedent to the same; something touching the supposed contract must be asserted on the one side and denied on the other to have been agreed. In a word, relief proceeds upon the ground of want of agreement—the minds of the parties have not met<sup>4</sup>.

2. The Courts therefore will not interfere for mere mistake, however serious, in regard to an external matter not a subject of the agreement or a condition precedent to the existence of the same. In case of misapprehension or ignorance of such a matter interference may be expected only when there has been fraud or at least misrepresentation in regard to it by the other side<sup>5</sup>.

3. On the other hand, the Courts will interfere (a) where, in any

<sup>1</sup> The following article will appear in substance as a note to the next edition of Story's Equity Jurisprudence.

<sup>2</sup> Pollock, Contract, 392 (4th ed.).

<sup>3</sup> See the careful analysis of Mistake by Mr. Pollock, Contract, ch. 8, and that by Mr. Holmes, Common Law, lect. 9.

<sup>4</sup> See Pollock, Contract, 404 (4th ed.).

<sup>5</sup> In putting fraud and misrepresentation in the same category with mistake Mr. Holmes has used the former terms in a somewhat unfamiliar sense, but, as he explains the matter, in a proper sense for special cases, as it seems to me. E. g. risk A is represented by a person obtaining insurance as risk B. Now the underwriter has never assented to any proposal covering risk A; hence no contract to that effect has been created. *Carpenter v. American Ins. Co.*, 1 Story, 57; *Goddard v. Monitor Ins. Co.*, 108 Mass. 56; Holmes, Common Law, 314.

case, the minds of the parties did not meet, or (*b*) where, in the case of a written contract, they did not meet on the terms expressed in the writing but did meet on other terms not there appearing.

In regard to all of these propositions it is probably safe to assume, in accordance with the way the first one is framed, that the rule is the same with regard to equitable pleas, where fully allowed at law, as in courts of equity; the English statute at all events is held to have done away with the old differences between courts of law and courts of equity in respect of mistake<sup>1</sup>.

In this connection a suggestion may be made upon common language of the cases in regard to materiality. The proposition is that the ground of interference must be mistake in the very agreement—when not in regard to a condition precedent. Now, where mistake is found to have been made with reference to an agreed term of a contract, the question of the materiality of the term must be excluded; the parties by making it a subject of agreement have made it material, and the courts can have no right to put a different construction upon it<sup>2</sup>. It is worse than idle with reference to such a case to say that the subject of the alleged mistake must be material. But where the question is whether a mistake was made, as it usually is, the apparent materiality or immateriality of the subject of the mistake may have a bearing upon the decision of the question<sup>3</sup>. On the other hand, where it is sought to strike out a clause as not agreed upon in the preliminary negotiations, and as inserted by mistake, the materiality of the clause as interpreted by the Court *will* be the test of the right to the relief sought.

The second proposition—that the Courts will not interfere for mere mistake as to an external matter not a subject of agreement or a condition precedent thereto—is a necessary result of the first. Illustrations may be found in some recent cases cited in the note below<sup>4</sup>. The proposition covers all that class of cases in which it is held that, in addition to the ignorance of the plaintiff, knowledge on the part of the defendant in respect of the matter in question is not sufficient to justify relief, nor by the current of authority even knowledge by the defendant of the plaintiff's ignorance<sup>5</sup>. There must be some misleading act by the defendant to afford ground for relief.

The third proposition comes more frequently into operation: the

<sup>1</sup> *Redgrave v. Hurd*, 20 Ch. D. 1, 12. [Such terms as 'equitable plea at law' are of course not applicable to English practice since the Judicature Acts. Parliament can command unity of jurisdiction if not of jurisprudence.—Ed.]

<sup>2</sup> The familiar case of warranties in insurance policies affords an illustration.

<sup>3</sup> *Grymes v. Sanders*, 93 U. S. 55, well illustrates this. See also *Chapman v. Coats*, 26 Iowa, 288.

<sup>4</sup> *Dambmann v. Schulting*, 75 N. Y. 55; *Whittemore v. Farrington*, 76 N. Y. 452; *Webster v. Stark*, 10 Lea (Tenn.) 406.

<sup>5</sup> *Laidlaw v. Organ*, 2 Wheat. 178; *Smith v. Hughes*, L. R., 6 Q. B. 597; *Story*, Equity, § 149.



Courts (to repeat it) will interfere (a) where, in any case, the minds of the parties did not meet, or (b) where, in the case of a written contract, they did not meet on the terms expressed in the writing, but did meet on other terms not there appearing. The first of these two cases in its most common form in equity is a case for injunction and rescission, to be followed if need be by delivery up for cancellation, though it may of course be a case for defence at law either upon an ordinary or an equitable plea. The only feature of the case that calls for remark here is the fact that in this class of cases mistake of the plaintiff is sufficient alone to authorise relief; neither injunction, rescission, nor the equivalent equitable defence at law, requires any proof of mistake or of fault on the part of the defendant, so long as damages are not sought<sup>1</sup>. A term of the written contract has been inserted or omitted which the plaintiff never agreed to have there, or to have omitted, as the case may be.

The second part (b) of the proposition, upon which an unexpressed term is to be introduced into the writing, covers the case so much considered by the Courts under the name of mutual mistake<sup>2</sup>. In order to justify the substitution of one term for another in the writing, or the insertion of an omitted term, it is plain that the *intention* of the parties, in respect of the proposed change, should be shown to be one<sup>3</sup>. But that is enough<sup>4</sup>.

It is not my purpose here to show the application of these propositions further in the working out of the question of relief for mistake of fact; nor indeed do I propose to make direct use of them in working out the question of relief for mistake of law. But that they are in essence applicable as a general working theory to the latter case as well as to the former is, I think, clear if it be conceded that relief for mistake of law can be granted at all. If relief is to be given, it must be given on the ground of want of union of minds; if the parties have agreed upon the law, then, be their view right or wrong, there can be no relief.

An answer to a possible objection based on the second proposition, as to the insufficiency of an external matter, may here be made. Whatever may be said of the machinery of the law, the law itself is not a thing external to the contract; it is not like

<sup>1</sup> *Redgrave v. Hurd*, 20 Ch. D. 1; *Arkwright v. Newbold*, 17 Ch. D. 301, 320; *Reese Siloer Mining Co. v. Smith*, L. R., 4 H. L. 64. See *Kilmer v. Smith*, 77 N. Y. 226; *Price v. Ley*, 4 Giff. 235; S. C., 9 Jur. N. S. 295; *Bridges v. McClendon*, 56 Ala. 327, 333.

<sup>2</sup> The term is not quite fitting, for there is no mistake as to what was agreed; the mistake is in the writing, and the defendant may have intended that. The mistake would then be on one side only. *Rider v. Powell*, 28 N. Y. 310.

<sup>3</sup> *Diman v. Providence R. Co.*, 5 R. I. 130; *Thompsonville Co. v. Osgood*, 26 Conn. 16; *Betts v. Gunn*, 31 Ala. 219; *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Wright v. Goff*, 22 Beav. 207; *Metropolitan Soc. v. Brown*, 26 Beav. 454. See Pollock, *Contract*, 426 et seq. (3rd ed.).

<sup>4</sup> *Rider v. Powell*, *supra*.

the secret mine in the vendor's land or the unknown treaty of peace which will affect the price of a commodity. The law creates, or at least supports, the right; the right does not exist, or does not exist usefully, without the law. It is quite as proper to say, with reference to the existence of the law, that the minds of the parties have not met, as it is to say the same with reference to the existence of the subject of a bargain. That subject is what it is because the law makes it such. It is only necessary to add that the consideration of the cases which follows is but a special view of the general doctrine of assent.

It is too late certainly at the present day to doubt the existence of jurisdiction in equity to grant relief on the ground of a pure mistake of law; though it must be admitted that such doubt has been entertained, and the jurisdiction sometimes directly denied, in recent times<sup>1</sup>. Opposed to this, however, there is a long line of specific authorities, most of them correct beyond question, in which relief for mistake of law has either been granted or admitted to be a proper head of equity jurisdiction. These will appear throughout the rest of this article.

Want of harmony, however, exists in regard to the special principle on which such relief is to be granted or refused; and it will be noticed upon an examination of the cases that the Judges are always glad to discover some special equity, aside from the mistake of law, which with the mistake may make their course more clear. Perhaps Judges have sometimes been too ready to steer away from the dangers of the subject. It may be safe to say with Mr. Justice Story<sup>2</sup>, though that is not quite clear, that 'where a party acts or agrees in ignorance of any title in him . . . [he] seems to labour in some sort under a mistake of fact as well as of law.' That is very guarded language. Whether it would be safe to put the case in bolder and positive terms, with recent authorities<sup>3</sup>, is still less clear; and there surely is no need in such a case of falling back upon the law of mistake of fact. To do so seems to cast doubt upon the jurisdiction of equity altogether over mistake of law; for the case is or may be one of the clearest cases of mistake of law, as where a conveyance has been made carrying in effect curtesy, when a recent statute, unknown to the grantor, has been passed creating or reviving such an estate. And it is proper to notice at the outset that if the terms 'mistake of law' and 'ignorance of law' were always used with strict propriety, it

<sup>1</sup> *Peters v. Florence*, 38 Penn. St. 194; *Goltra v. Sanasack*, 53 Ill. 456; *Zollman v. Moore*, 21 Gratt. (Va.) 313, 324; *Brown v. Armistead*, 6 Rand. (Va.) 594.

<sup>2</sup> *Equity Jur.* § 130.

<sup>3</sup> *Cooper v. Phibbs*, L. R., 2 H. L. 149, 170; *Beauchamp v. Winn*, L. R., 6 H. L. 223, 234; *Jones v. Clifford*, 3 Ch. D. 779, 792.

would be found that the cases in which relief is granted are cases of ignorance and not of mistake; which latter term implies some notice and consideration of the law. But the terms are commonly used as synonymous; or rather the term 'mistake' has nearly usurped the other's place.

Nor will it do, with *Lansdowne v. Lansdowne*<sup>1</sup> and more recent expressions<sup>2</sup> following in the lead of that case, to relegate the whole maxim concerning ignorance of law to the domain of criminal jurisprudence, and so give to equity a broad and indefinite jurisdiction of relief. The jurisdiction is sufficiently delicate and dangerous when confined within limits. A pretty wide door appears to have been thrown open still, in the well-known dicta of Lords Westbury and Chelmsford, and similar dicta in the United States<sup>3</sup>, wide enough indeed to ease the jurisdiction somewhat, but wide enough also, it would seem, to make doubtful the validity of a good many contracts, and to overturn a good many decisions. According to those dicta, the word 'jus' in the maxim 'ignorantia juris hand excusat' refers only to general well-known law, as distinguished from private right generally and rights arising e.g. from the doubtful construction of a grant. Now, not to mention the difficulty of applying the interpretation<sup>4</sup>, it is just this latter class of cases to which the refusal of relief has most frequently been applied in cases of real authority, at least in the United States, as will appear in the consideration of the subject later. True it is held in America, and doubtless correctly, that the maxim applies only to general public, and not to private, acts of the Legislature or to the laws of another State or country. Such laws may, if that is necessary for the purpose, well be treated as facts<sup>5</sup>. But that is a different thing from the interpretation of 'jus' above referred to; and until the widening of jurisdiction involved in that interpretation has been accepted as law, we may still be expected to look after the narrow doctrine of the cases generally.

What then is the doctrine—the narrower doctrine—to be extracted from the decisions of the Courts? So far as the *denial* of relief is concerned, it is apprehended that the true principle is to be found in the much quoted, but sometimes misapplied, case of *Hunt v. Rousmaniere*<sup>6</sup>, particularly in its first phase before the Supreme

<sup>1</sup> Meol. 364; S. C., 2 Jac. & W. 205. See Story, Equity Jur. § 125.

<sup>2</sup> *Wyche v. Greene*, 16 Ga. 49, 58; *Jacobs v. Morange*, 47 N. Y. 57, 61.

<sup>3</sup> *Cooper v. Phibbs*, L. R., 2 H. L. 149, 170; *Beauchamp v. Wren*, L. R., 6 H. L. 223, 234; *Jones v. Clifford*, 3 Ch. D. 779, 792; *Webb v. Alexandria*, 33 Gratt. 168, 176; Story, Equity Jur. § 125.

<sup>4</sup> See Story, Equity Jur. § 126.

<sup>5</sup> *King v. Doolittle*, 1 Head (Tenn.) 77, 84; *Haven v. Foster*, 9 Pick. 112 (foreign laws).

<sup>6</sup> 8 Wheat. 174; S. C., 1 Peters, 1.

Court of the United States. In that case a person lending money on the security of ships deliberately, after consulting counsel, took a letter of attorney with power to sell the property, in preference to a mortgage thereon, upon the mistake of law that the security taken would bind the property, in case of the death of the borrower, to the same extent as a mortgage. The debtor dies, and the lender attempts to have the instrument taken reformed so as to make it express the real intention of the parties (if the law should be considered against the interpretation of the counsel, which makes the case, it would seem, fall within Lord Chelmsford's interpretation of 'jus'); and he fails.

Now I purpose to examine this case somewhat for several reasons; first because, treated justly as a leading case, it has, I think, been misunderstood; secondly, because in the frequent citation of it on the subject of powers, the other feature of the case—its instructiveness on the subject of mistake of law—appears to have been much forgotten; and thirdly, because it seems to me that a most valuable positive proposition concerning relief may be drawn from it, as well as the true rule concerning the refusal of relief, which it more directly declares.

It has been supposed that *Hunt v. Rousmaniere* draws a distinction between mistake made in reducing to writing a contract already agreed upon by the parties,—the mistake being that the language of the writing has a meaning or effect in law different from the intention,—and mistake with regard to the legal meaning or effect of a written instrument agreed upon as representing the contract of the parties. The first case is accordingly supposed to be a case for relief, while the second is not<sup>1</sup>.

Such a distinction, however respectably kept afloat, cannot be sound. The writing is agreed upon as stating the contract in the one case as much as in the other. It matters not whether the parties say, 'Here are the facts, and here is what on deliberation we want to do,' and then accept from the draftsman the written instrument and execute it as embodying their intention; or, 'This writing on consideration we accept as truly expressing our intention and fix our signatures to it accordingly.' The second act may imply more deliberation concerning the writing; but in neither case may the deliberation have touched the legal difficulty which finally arises. That may not have been in the minds of the parties at all. The distinction is trifling; it does not go to the root of the matter.

But *Hunt v. Rousmaniere* draws no such distinction in either of its

<sup>1</sup> *Larkins v. Biddle*, 21 Ala. 252; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 320. See also *Stafford v. Fellers*, 55 Iowa, 484; *Pitcher v. Hennessey*, 48 N. Y. 415, 424; *Nelson v. Davis*, 40 Ind. 366; *Heavenridge v. Mondy*, 49 Ind. 434; *Laver v. Dennett*, 109 U. S. 90 (a case of laches).

stages. The case in its first appearance before the Supreme Court of the United States is clearly stated by Chief Justice Marshall; and it would have been better perhaps for the law had it not gone again before the Court. In giving the opinion of the Court the Chief Justice says: 'The agreement stated in the bill is generally that the plaintiff, in addition to the notes of Rousmaniere, should have specific security in the vessels; and it alleges that the parties applied to counsel for advice respecting the most desirable mode of taking this security. On a comparison of the advantages and disadvantages of a mortgage and an irrevocable letter of attorney counsel advised the latter instrument, and assigned reasons for his advice; the validity of which being admitted by the parties, the power of attorney was prepared and executed, and was received by the plaintiff as full security for the loans<sup>1</sup>.'

Here was the whole case; deliberation with knowledge of the safe course (though not as safe) and choice of the unsafe. True, on the next page the Chief Justice, in putting the case for decision in general terms, says, 'The parties deliberately, on advice of counsel, agree on a particular instrument,' without adding 'in preference to another before them which would have effectuated the intention,' but the whole case shows that such should be understood as a governing factor in the decision. It is true also that in the second stage of the case<sup>2</sup> Mr. Justice Washington, who now delivered the opinion of the Court, uses some expressions which, taken apart from the rest, might be thought broad enough to suggest some such distinction as that in question. He says: 'Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake<sup>3</sup>.' But that must be understood with reference to the case before the Court; and the learned Judge himself so declares. That the doctrine just quoted would not apply where the parties deliberated upon the particular terms or instrument employed, with other effectual terms or instruments before them, making choice of the ineffectual, is the very point decided. The 'intention,' on the evidence, was 'manifest' enough<sup>4</sup>. Indeed the

<sup>1</sup> 8 Wheat. 209.

<sup>2</sup> 1 Peters, 1.

<sup>3</sup> Story, Equity Jur. § 115; *Pitcher v. Hennessey*, 48 N. Y. 415, 423. See *Leaf's Appeal*, 95 Penn. St. 279, 284; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 319, 320. The passage quoted appears to have wholly misled the Court in the latter case.

<sup>4</sup> By 'manifest intention' the learned Judge could hardly have meant manifest on the face of the instrument, for no such case was before the Court; nor would any reformation of the contract be necessary if the mistake, with the correction required, i.e. the 'intention,' were manifest on the face of the writing.

whole case is afterwards well summed up by the same Judge. 'We mean to say that where the parties, upon deliberation and advice, reject one species of security and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a Court of Equity will not, on the ground of such misapprehension and the insufficiency of such security . . . direct a new security<sup>1</sup>.'

The case of *Hunt v. Rousmaniere* decides then this very intelligible and sound principle, that where a particular course is taken upon deliberation, in preference to another present to the minds of the parties, that action, so far, is final. A letter of attorney was considered as having the same effect for the matter in hand as a mortgage. There was a choice of ends before the lender, in that both the preferable and the adopted course of action was under consideration; he elected his course; by so doing he bound himself. This, it is apprehended, affords a safe suggestion of the true specific ground of equity jurisdiction over cases of mistake.

Indeed the jurisdiction ought, on the point of 'deliberation' in the ordinary sense, to be somewhat narrower; and cases to be presented will indicate that it has in truth been treated as having a somewhat narrower basis. The working principle, however, is still that of *Hunt v. Rousmaniere*. The test to which the question of jurisdiction should be brought is this: Was there in truth a choice of ends open to the complaining party at the time? That is, was a doubt raised in his mind whether the particular word, phrase, term, or instrument was sufficient in law to effectuate the intention, and nothing more than that? If there was, he was put to a choice; and the choice made, though perhaps not on such deliberation as took place in *Hunt v. Rousmaniere*, must be binding<sup>2</sup>. If no other course than that adopted occurred to the parties for carrying out their purpose, then though the words that were used were intended<sup>3</sup>, no choice of ends could have been made in respect of the mistake, and equity should grant relief.

Other cases will now be brought to bear on the test here suggested; first, as in *Hunt v. Rousmaniere*, on the refusal of jurisdiction. The recent case of *Rogers v. Ingham*<sup>4</sup>, in the English Court of Appeal, though a case into which other considerations, such as laches and change of position, entered, proceeds, in part at least, upon the ground which governed *Hunt v. Rousmaniere*. That was a case of the payment of money by an executor to one of two legatees, on advice of legal counsel, taken by both sides to the

<sup>1</sup> 1 Peters, 17.

<sup>2</sup> But see *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 319.

<sup>3</sup> *Coady v. Marcy*, 13 Gray, 373. See however *Havenridge v. Moody*, 49 Ind. 434.

<sup>4</sup> 1 Ch. D. 351.

same effect, with all questions of law under consideration; which payment, two years afterwards, and after distribution of the estate, the other legatee sought to impeach for mistake of law. The decision is finally put thus by Lord Justice James: 'Where people have a knowledge of all the facts, and take advice, and, whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be opened.' Still more clearly Lord Justice Mellish puts the case as one of deliberation and choice. 'Both parties,' he says, 'were well aware that the [legal] question was then [when the transaction took place] to be decided; the plaintiff's attention and the attention of the plaintiff's legal advisers were called to all the facts and circumstances; she took advice upon the point<sup>1</sup>.'

The same principle may be seen in the case of *Weed v. Weed*<sup>2</sup>. There it appeared that a lady, with full knowledge of all the facts, but through a mistaken belief that her interest in certain real estate was not subject to execution, had lost her title through a regular sale, on judgment, execution, and conveyance of the land by the sheriff. She had taken legal advice on the question whether the property, under a peculiar deed which had been made to her, could be taken on execution, and believing the erroneous advice given to be correct, had delayed action until the time of redemption had expired. Relief was properly refused; the party had made up her mind, with the doubt before her. So in a case in Missouri, where the defendants had taken advice concerning the validity of a judgment before purchasing under it. The parties bought, and it was held that they could not allege that the advice given was erroneous<sup>3</sup>. So too, though parties have misconstrued even a doubtful statute, they must still, it is held in the United States, abide by the construction they have put upon it<sup>4</sup>.

Other cases might be referred to, to the same effect<sup>5</sup>. And (if we except some decisions based on the distinction above criticised<sup>6</sup>) few if any cases inconsistent with this view, so far as it

<sup>1</sup> See also *Stone v. Godfrey*, 5 De G. M. & G. 76; *Kitchin v. Hawkins*, L. R., 2 C. P. 22. And among cases of the compromise of rights doubtful in law see *Stewart v. Stewart*, 6 Cl. & F. 911, 967; *Pullen v. Ready*, 2 Atk. 587; *Gibbons v. Count*, 4 Ves. 840; *Ex parte Lucy*, 4 De G. M. & G. 356; Story, *Equity Jur.* § 131.

<sup>2</sup> 94 N. Y. 243.

<sup>3</sup> *McMurray v. St. Louis Oil Co.*, 33 Mo. 377.

<sup>4</sup> *Bank of United States v. Daniel*, 12 Peters, 32. Is not this a case within Lord Chelmsford's dictum in *Beauchamp v. Winn*, *supra*?

<sup>5</sup> See *Smith v. Hitchcock*, 130 Mass. 570.

<sup>6</sup> The case of *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 320, proceeding on that distinction, is certainly wrong. Relief was there held proper 'after discussion of the very question' of law misunderstood.

is applied to the refusal of relief, can be found. A recent decision of the Supreme Court of Michigan<sup>1</sup> may at first seem such a case. A woman, the plaintiff, had married a man who had a wife living to her knowledge, from whom however he had separated under articles of agreement. This fact was known to the plaintiff, but she professed to have supposed at the time that the articles constituted a divorce. No fraud had been practised upon her. On discovering her mistake she sued for divorce with alimony. Both were refused. Mr. Justice Campbell, speaking for the Court, said that it could not be presumed (that is, believed) that any person of ordinary intelligence could suppose that marriage could be dissolved by consent of parties. But even supposing such a belief possible—it might be quite possible in the case of a foreigner—public policy would probably have led the Court to the same conclusion with regard to a question so momentous as marriage and divorce. One should carefully look into the case before marrying a person known by one to have a husband (or wife) living. The plaintiff must at least have been put to a doubt, and that in the view here taken is enough. So where *L*, after the death of his wife, paid a mortgage made by her on her own property, on the mistaken belief either that the property had become his by descent or that he was bound as his wife's executor to pay it, relief was refused him<sup>2</sup>. The facts show that he was in doubt as to the state of the title and elected his course.

The Court in *Harner v. Price*<sup>3</sup> may be thought to have gone contrary to the doctrine of *Hunt v. Rousmaniere*. In that case the plaintiff had acknowledged judgment on a non-negotiable note barred by limitation. He did not know the law, and was induced by the defendant, but not fraudulently as it was found, to make the acknowledgment. Relief was refused. This however was a case where the plaintiff owed the debt in conscience, and had come into a court of conscience to obtain relief from a very proper act. The equities on the defendant's side were at least equal to those on the side of the plaintiff<sup>4</sup>. In this view the case is not unlike cases referred to in *Hunt v. Rousmaniere*, of joint obligors, after the death of one of them and discharge of his personal representations, being still held to the obligee as if the bond had been joint and several, on the ground that they had received the consideration for their promise; and it was to be assumed that they intended

<sup>1</sup> *Lapp v. Lapp*, 43 Mich. 287.

<sup>2</sup> *Peters v. Florence*, 38 Penn. St. 194. See also *Guckian v. Riley*, 135 Mass. 71; *Moorman v. Collier*, 32 Iowa, 138.

<sup>3</sup> 17 W. Va. 523.

<sup>4</sup> *Comp. Northrop v. Graves*, 19 Conn. 548. This however is not brought out in the opinion printed.



to bind themselves severally as well as jointly. This however was treated as doubtful law in our principal case unless the failure to make the bond several was due to mistake of fact.

This brings me to the case of money paid under mistake of law, which is supposed to present the one permanent exception to the right to relief for mistake<sup>1</sup>; and this appears to be true in England, though it must strike the observer as odd that while no amount of negligence can there bar one from the right to recover money back which one has paid under mistake of fact<sup>2</sup>, no case of ignorance of the law can give one a right to a return of money paid<sup>3</sup>. This doctrine has also been affirmed in the United States<sup>4</sup>, but it cannot, broadly stated, be said to be settled law there, as the case just cited and others show<sup>5</sup>. I cannot quite fall in with the suggestion<sup>6</sup> that the Supreme Court of the United States had this distinction in mind in the case already referred to of *Bank of United States v. Daniel*, and tacitly likened the payment of a bill of exchange to the payment of money accordingly. I think the court had in mind the rule in the then recent case of *Hunt v. Rousmaniere*, which is certainly cited. 'In the construction,' they say, 'of the statute the appellees were mistaken'.

But why should there be any difference between the case of money paid under mistake of fact and money paid under mistake of law? In the latter case as well as in the former the receiver gets what does not belong to him, what there was no intention to give him, what there was no consideration for paying. It would be difficult to distinguish such a case from the class of cases already mentioned, in which it is held with perfect unanimity that where a party acts in entire ignorance of any title in himself, or supposes that he has a title when he has not, equity will take jurisdiction and save the right or grant the proper relief<sup>7</sup>. It has been held too in

<sup>1</sup> Pollock, Contract, 408 (4th ed.).

<sup>2</sup> *Willmott v. Barber*, 15 Ch. D. 96; *Townsend v. Crowley*, 8 C. B., N. S. 477; *Dails v. Lloyd*, 12 Q. B. 531; *Kelly v. Solari*, 9 M. & W. 54.

<sup>3</sup> *Bilbie v. Lumley*, 2 East, 469; *Rogers v. Ingham*, 3 Ch. D. 351; *Stewart v. Stewart*, 6 Cl. & F. 911, 968.

<sup>4</sup> *Livemore v. Peru*, 55 Maine, 469.

<sup>5</sup> See especially *Northrop v. Graves*, 19 Conn. 548; *Covington v. Powell*, 2 Met. (Ky.) 226, 228.

<sup>6</sup> Pollock, Contract, 409 (4th ed.).

<sup>7</sup> Also, 'The principals, who transacted the business, had the statute before them, or were familiar with it as we must presume.' It must be admitted however that the court did not emphasise, or even state in terms, the rule in *Hunt v. Rousmaniere*, and that there is indication of a disposition to restrict its application. This is the more to be regretted, as the opposite course would both have prevented the rule from being forgotten and the case itself from being turned into wrong channels.

<sup>8</sup> *Bingham v. Bingham*, 1 Ves. Sr. 126; *Cooper v. Phibbs*, L. R., 2 H. L. 149; *Beauchamp v. Winn*, L. K., 6 H. L. 223; *Jones v. Clifford*, 3 Ch. D. 779; *Cochrane v. Willis*, 34 Beav. 368; s. c. L. R., 1 Ch. 58; *Re Saxon Life Assurance Soc.*, 2 J. & H. 408; *Conward v. Hughes*, 1 K. & J. 443; *Forman v. Wright*, 11 C. B. 481, 492; *McCarthy v.*

Massachusetts that an indorser of a promissory note, discharged for want of notice in due time, who on receiving notice promises to pay, under the mistake of law that he is bound, may allege his mistake<sup>1</sup>. This however is opposed to the decision of the King's Bench in *Stevens v. Lynch*<sup>2</sup>, and if there was any moral duty to pay, is also opposed to the West Virginia case of *Harner v. Price* above considered.

The doctrine in question is traced back to *Bilbie v. Lumley*<sup>3</sup>; but though Lord Ellenborough is indeed there reported to have laid down the broad rule denying relief, it appears to have been unnecessary to do so, or to do so without qualification. An attempt was made in that case by an insurance company to recover back money paid under a mistake of law concerning the effect of a particular concealment by the assured. All the facts were before the underwriters, including the one in question, and they adjusted and paid the loss. The company well knew that concealment in general was ground of discharge of their liability; with such knowledge they considered the particular fact and acted. They elected their course. It may be noticed that Lord Ellenborough does not base the decision of the case upon any ground peculiar to the attempt to recover back money paid; he would, it seems, have applied the same rule to any other case of mistake of law. His opinion too, as reported, is short, and apparently off-hand.

Thus far of the doctrine in question in respect of the denial of relief. That the converse of it holds equally well for granting relief may not perhaps be so decisively shown; still I think that may be shown with reasonable clearness. From almost every case in which relief has been granted either the element of choice between means or ends—choice between the safe and the unsafe course—was absent and but one course suggested or thought of by the parties, or some other special equity existed in favour of the plaintiff. In this state of things—a well-defined rule that the exercise of choice is final, and the fact that in the cases in which relief has been granted there has been wanting an opportunity for choice—the inference is reasonable that want of opportunity, i. e. absolute ignorance, is a ground of relief. Indeed here appears to be a case for a crucial test of the proposition that want of assent is ground for relief from

*Decais*, 2 R. & M. 614; *Griffith v. Townley*, 69 Mo. 13; *Blakeman v. Blakeman*, 39 Conn. 320; *Watson v. Watson*, 128 Mass. 152, 155; Story, Equity Jur. § 130.

<sup>1</sup> *Warder v. Tucker*, 7 Mass. 449. See *May v. Coffin*, 4 Mass. 341.

<sup>2</sup> 12 East, 38.

<sup>3</sup> 2 East, 469. It has been held, on the ground of mistake, that a blank indorsement of a promissory note may be reformed so as to make it an indorsement without recourse, in conformity with an oral agreement that the indorser should not be held on his indorsement. *Stafford v. Fetters*, 55 Iowa, 484. But there is probably no mistake at all in such a case; there is a mere oral agreement to vary the legal significance of the contract.

the consequences of mistake of law. If there is no possibility of choice, there is no true assent, and relief should be granted;—that is the proposition to be tried.

Let us turn again to the authorities and apply the test. In *Pitcher v. Hennessey*<sup>1</sup> it appeared that the plaintiff had leased a vessel of the defendant, assuming the 'risk of navigation.' A particular risk, *inter alia*, was by mistake of law supposed by the parties to be covered by this term; and the lease was reformed. No occasion for doubt appears to have arisen, and there was therefore no true choice of terms. If the words had been chosen against a doubt of their sufficiency, there would then, and only then, have been an election<sup>2</sup>. The same may be said of another New York case in the same volume of Reports<sup>3</sup>. It had been agreed that the plaintiff should have a judgment against J. C. which should be a lien upon his property. By mistake of law, but without any doubt as to the proper course, so far as appears, the judgment was docketed in the wrong county—a county which afterwards turned out to have been illegally organised. Relief was granted. But if the parties had agreed to have the judgment docketed in the particular county in the face of a doubt raised, could any Court have interfered and declared the agreement immaterial?

The case of *Lanf's Appeal*<sup>4</sup> is worthy of special notice. A will was there treated in equity as an antenuptial agreement, in order to effectuate the intention of parties, which otherwise, by mistake of law, would have miscarried. A lady about to marry had made the will, on a valid agreement between herself and her intended husband that she might dispose of her property by will or otherwise as she pleased; which will was revoked by operation of law on her marriage, an event not contemplated in any way. The decision seems perfectly sound; there was no choice between the effectual and the adopted course. The language of the Court however is open to objection. It was said that whenever one has a legal right to dispose of property and means to dispose of it, the form of the instrument adopted for the purpose, if in law ineffectual as it stands, will be disregarded, and equity will enforce the intention. Now if this was intended as a broad rule of law, it is not consistent with *Hunt v. Rousmaniere*. If the particular instrument was chosen, as in that case, in preference to another, on the point at issue, equity

<sup>1</sup> 48 N. Y. 415.

<sup>2</sup> The Court on p. 424 barely falls short of this position. An illustration may there be seen of the common missing of the vital point of *Hunt v. Rousmaniere*, or at least of the failure to bring that point out clearly—the preference of one writing over another on the matter at issue.

<sup>3</sup> *Launing v. Carpenter*, 48 N. Y. 408.

<sup>4</sup> 95 Penn. St. 279.

will not interfere; but understood with this qualification, the proposition is useful <sup>1</sup>.

In this connection a case decided by the Supreme Court of California <sup>2</sup> may be noticed. Relief was there granted on the following facts: Land bought by A. was at his request conveyed to his wife as 'community' property under the laws of California. Such property there is not liable for the wife's debts. The wife gave back a mortgage and notes to secure the unpaid purchase money. The Court held that the mortgagee had, without regard to any vendor's lien, an equitable mortgage on the estate for the purchase price. The case clearly falls within the principle under consideration. There was no election <sup>3</sup>.

A few cases not so clear may be noticed; among them one by the Supreme Court of Alabama <sup>4</sup>. A father having a daughter unprovided for, whose husband was improvident, determined to vest property in a trustee to her sole and separate use for life, remainder to her children. Instructions were given accordingly to an attorney; but in drawing the deed he omitted the words 'to her sole and separate use,' whereby the estate became vested in the husband for life, and was levied upon by his creditors. The deed was reformed. This looks very much like a mistake of fact; if the omission was witting, it is hard to understand the case <sup>5</sup>. There is a similar case in the same court, where the grantor had been his own draftsman and relief was granted <sup>6</sup>.

In the recent case of *Snell v. Insurance Co.*<sup>7</sup>, in the Supreme Court of the United States, there was a special equity. It appeared that the plaintiff had been induced to act upon the superior knowledge of the defendant's agent. An agreement had been made between A and B that certain insurance should be granted by B on property of a firm of which A was a member. B's agent, without fraud, induces A to have the policy made in his own name, assuring him that in that form it will protect the firm. The Court decided that the policy must be reformed to meet the intention of the parties, on

<sup>1</sup> The rule would also be too broad for the case of a mistake in the execution by a married woman of a statutory conveyance of her own property before the recent enabling Acts. *Martin v. Dwellly*, 6 Wend. 9; *Heaton v. Fryberger*, 38 Iowa, 185, 201; *Gebb v. Rose*, 40 Md. 387. It should perhaps be noticed too in this connection that a deed of gift of realty by a wife directly to her husband, under mistake of law that it would be good, will not be upheld. *Gebb v. Rose*, supra. But both of these cases stand on special grounds that do not interfere with the rule under consideration.

<sup>2</sup> *Remington v. Higgins*, 54 Cal. 620.

<sup>3</sup> The Court referred to the class of cases of instruments defectively executed, where relief is granted. *Love v. Sierra Nev. Mining Co.*, 32 Cal. 639.

<sup>4</sup> *Stone v. Hale*, 17 Ala. 557.

<sup>5</sup> Unless the attorney made a mistake of law, and the father a mistake of fact in not noticing the omission!

<sup>6</sup> *Larkins v. Biddle*, 21 Ala. 252.

<sup>7</sup> 98 U. S. 85.

the ground that *A* had trusted *B*'s agent concerning the proper mode of executing the policy. The case was therefore one of trust<sup>1</sup>.

It may also be that when a person by mistake of law acts to his detriment under what may be called compulsion, though compulsion might of itself be lawful, he will be entitled to relief, especially if the other party knew that in the particular case the law did not entitle him to the benefit; and this too though the injured party was seeking at the time to discover what the law required. Thus it is held that a man may have relief from a return of property for taxation when it appears that by mistake of law he included exempt property<sup>2</sup>.

Certain cases of the unauthorised acts of corporations may also clearly fall without the rule in *Hunt v. Roumaniere*. A corporation has no power beyond that conferred by the Legislature; and if such a body should e.g. issue bonds without authority, the fact that a purchaser was ignorant of the existence of a law making them absolutely void would not help his case in a suit against the corporation, even if it would in a suit against his vendor, supposing the plaintiff had not bought of the corporation. In *Rockester v. Alfred Bank*<sup>3</sup> it appeared that a public statute had gone into effect, by which the authority of a town to issue bonds had been taken away, of which a purchaser alleged ignorance. But the Court said that by taking notice of the time when the statute took effect, and examining the date of the bonds, the want of authority would have appeared.

A difficult question—difficult because of its close relation to deep and doubtful questions of public policy—is presented by the case of a judicial decision overturning what before had been supposed to be law. If a statute is (in the United States) declared unconstitutional, transactions intermediate must be readjusted as far as may be<sup>4</sup>; and the general theory in regard to the overruling of former decisions no doubt is that the law always was what it has been declared to be by the later authority. But the Courts are not agreed in the wisdom of pressing the theory to the dangerous extreme of overturning intermediate transactions founded on the

<sup>1</sup> To the same effect, *Woodbury Bank v. Charter Oak Ins. Co.*, 31 Conn. 517. For the converse case of encouraging action, see *Storrs v. Barker*, 6 Johns. Ch. 166; *Zollman v. Moore*, 21 Gratt. (Va.) 313, 326; *Kitchin v. Hawkins*, L. R., 2 C. P. 22, 31; not cases of agency.

<sup>2</sup> *Charlestown v. Middlesex*, 109 Mass. 270. See *Dunnell Manuf. Co. v. Pawtucket*, 7 Gray. 277.

<sup>3</sup> 13 Wis. 432.

<sup>4</sup> Comp. *Harney v. Charles*, 45 Mo. 157. It is at least doubtful if a person in the United States can by any agreement made be precluded from denying the constitutionality of a statute.

earlier declaration<sup>1</sup>. Where the decisions are in an unsettled state, and especially where a question of the true rule of law is known to be pending, parties acting may well be held to have bound themselves by the view of the law they have taken<sup>2</sup>. Perhaps this should not be invariably so where no doubt of the law had arisen at the time and the overruling decision followed soon. If then the former situation in the particular case could be restored, there might be ground for interference upon the principle under consideration in this article. But the question is a large one<sup>3</sup>.

MELVILLE M. BIGELOW.

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Since this article was put in type a case has been reported from the Supreme Court of Connecticut, in which it was decided that a widow's renunciation of provision in her husband's will, made under erroneous advice in law, may be withdrawn, if not yet acted upon. *Evans's Appeal*, 51 Conn. 435. See *Macknet v. Macknet*, 29 N. J. Eq. 54. The opinion unfortunately is not instructive. Nothing is said of the nature of the widow's renunciation of itself. It is clear that it does not become a judgment of Court, and it is not an act *inter partes*. It may well be revocable therefore within the statutory period, if not acted upon.—M. M. B.

<sup>1</sup> Against interference in such cases, *Lyon v. Richmond*, 2 Johns. Ch. 51, 60; *Jacobs v. Morange*, 47 N. Y. 57, 60; *Webb v. Alexandria*, 33 Gratt. (Va.) 168; *Baker v. Pool*, 56 Ala. 14; *Kenyon v. Welty*, 20 Cal. 637; *Kitchin v. Hawkins*, L. R., 2 C. P. 22. Contra, *Jones v. Munroe*, 32 Ga. 181; and see *Harney v. Charles*, 45 Mo. 157; Story, Equity Jur. § 138. The Supreme Court of Massachusetts also, as I am informed, have held, in an unreported case not argued upon this point, that an overruling decision must have a retroactive effect upon such transactions. *Reed v. White*, January Term, 1877. Notice the anxiety of the Legislature concerning rights in repealing a statute; should the Courts be unmindful of what they have led men to do!

<sup>2</sup> But see *Jones v. Munroe*, supra; also *Lyon v. Richmond*, supra; *Kenyon v. Welty*, supra, at p. 641.

<sup>3</sup> A special public policy, it may also be noticed, governs the case of mistake of law or of practice in the conduct of causes. See e. g. *Thurmond v. Clark*, 47 Ga. 500; *Jacobs v. Morange*, 47 N. Y. 57, 59.

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## THE POSITION AND PROSPECTS OF THE LEGAL PROFESSION.

SINCE 1873 a continual change of English legal procedure has been in progress, one which is not yet ended. But a sufficient time has elapsed since this period of reforms began to make it worth while to form some definite judgment on the position and prospects of the legal profession, more especially in connection with the changes just mentioned. Not that some social and national growths must be put out of view, for changes in procedure, however important and however apparently striking in their effects to the minds of those who necessarily must watch them very closely, are by no means the sole cause affecting the legal profession.

There are it is obvious two distinct points of view from which the latter may be regarded, either as a money-making body, or as a social and national order occupying a position among other classes of citizens, and filling an important and necessary place in the national economy as agents, whether as advocates or judges, in the administration of justice. The latter is plainly the point of view of the highest importance, though it is natural that the majority of lawyers should regard their profession chiefly from the breadwinner's point of view. Looked at thus, there are it may safely be said no surmises so uncertain as those which contain statements as to the position of the legal profession as a money-making business. Data for the accurate comparison of the profession at the present time in this respect to what it was any given number of years ago are not to be found. It is possible to compare the gains of individual leaders of the Bar with those of individuals who occupied the like position in times past. But as to any accurate comparison of the gains of the rank and file of the profession surmises are necessarily very vague, being in fact more or less guesses or estimates based on very imperfect materials. As to the leaders of the profession, they probably are in pretty much the same position as their predecessors. Tolerably fair judgments may be formed as to the amounts of a certain number of professional incomes, and biographies if examined will furnish a good deal of material from which to estimate the incomes of those who at one time had a high place among lawyers. To take one instance only. Lord Kingsdown relates in his Autobiography how he made £3000 a year before he was thirty; it is clear from the manner in which he states this fact that he regards it as something remarkable in

relation to the amount and the age of the gainer. But there is certainly one living leader of the Bar who made this amount before the age of thirty, and he probably takes a far larger sum in fees now as a leader than ever Lord Kingsdown did in his best days. To judge of the incomes of solicitors is more difficult. Of past practitioners no records are obtainable: as to present workers, none but the workers or their partners can do more than guess. Judging however by the character of legal work in the past and in the present, we should—if we may be allowed to guess—be inclined to say that the incomes of members of large commercial and business firms are now more considerable than they used to be, though during the last five or six years there may have been, owing to bad trade,—there now certainly is,—a falling off in the gains of most high class solicitors. It must always be remembered that England is now so very largely a commercial centre that a great deal of semi-foreign litigation takes place here in addition to semi-foreign business of a non-litigious character, and that nearly all of this falls into the hands of large commercial legal firms. The greater the facilities of communication with foreign countries become, the more this class of work must increase. On the other hand, the ordinary solicitor has to contend against increased competition and against a cheapening of law work of all kinds, and at the present time the depression in trade and agriculture. But against these adverse influences have to be placed, as permanent factors, the great increase of population, the increased facilities for obtaining legal assistance, and the steady growth of joint-stock enterprise. The only exceptions to the general average prosperity of solicitors—for the lessening of profits from the present depression is a temporary feature—are those firms in London who have carried on an agency business. The localisation of justice both by the establishment of District Registries and the use of the County Courts has prevented a considerable mass of business from finding its way to these firms. On the other hand it must not be forgotten, that though the gains do not go into the pocket of the London lawyer, they still flow into a lawyer's pocket, so that this loss to London has been really a gain to country lawyers, and the change of system which has changed the direction of the current of payment has not really injuriously affected the general body of solicitors.

There is great difficulty in estimating the result of recent changes on the fortunes of the Bar, and there can be little question that a depreciation in metropolitan business which is generally set down as being caused by the above changes is more properly ascribable to the transaction of business at local centres. This in itself is a necessity of the times, and the actual machinery for the purpose,



which so far as regards litigious work has been introduced by the Judicature Acts, is not in itself so much the cause as the instrument of the cause. The increase of the population, of the wealth, and the importance of the large provincial towns has necessitated legal just as much as it has political changes. Local political leaders are now far more independent of the control of the centre of their party in London than they used to be, and just as a town with an increased population has larger local political life and requires a more extended representation in Parliament, so it requires advocates on the spot to transact its legal business which must be performed in the local centre. This centre is justly so called, since every large town, such as Birmingham and Manchester, acts as the centre for the surrounding towns. This altered condition of things is really the factor which must be considered as the cause of recent changes, not the mere reforming activity of a Chancellor or the new systems of a legal committee. If these changes are regarded from a purely professional point of view, it is probable that they have enlarged the aggregate gains of the Bar, and at the same time have somewhat equalised them. No doubt a certain number of practitioners have been injuriously affected, but on every side persons are seen suffering from the effects of changes caused by movements which cannot be prevented. Take it all in all, it is impossible not to perceive that lawyers as a body have suffered less than most other classes of men by recent social, political, and economical changes. Each considerable provincial town now supports a larger or a smaller number of barristers, though even in the greatest provincial towns, such as Liverpool and Manchester, not more than one or two can succeed in making incomes which run into thousands. But, on the other hand, there are a number of men each earning several hundreds a year; and if we regard the general welfare of a class, it is obviously better that a larger number should make a fair livelihood in provincial towns than that a smaller number should grow rich in London. That the possibility of amassing not so much a large fortune but round capital sums by strong and able men is now distinctly less is perfectly certain. At the best of times it is more difficult in provincial towns to make large sums of money from a few cases; the bulk of the work must of necessity be comparatively small work; hence the same amount of labour cannot obtain the same amount of reward as in times when persons with local connection took the pick of the business. Added to this is the fact that most men who start in some particular locality have a small amount of local connection, sufficient at any rate to enable them to get a small amount of business. Nearly every solicitor's firm in a local centre has some barrister whom it desires to advance. When

a number of such men congregate together it is clear that the chance of the outsider is less than it used to be when Chancery work and Conveyancing were sent up to London, and Common Law work either went there or was transacted during the Judges' Circuits. All the time that the man without interest is waiting, the man with the firm at his back is gaining experience, and if he be reasonably sensible is becoming more and more capable of transacting ordinary legal business. If he be a man above the average he is not only doing this, but is laying the foundation of an ultimately extended practice, for in every local centre will be found one or two men who are greatly more sought after by clients than the generality of barristers. Consequently it is certain that the idea which so very largely exists among students and young barristers that the best professional opening is to settle in a large provincial town is entirely wrong, unless at the same time there is some kind of connection to bring the barrister into notice. In the same way the departure of much provincial work from London has produced to a certain but lesser extent the same effect in the metropolis, though its larger size and the greater variety of legal work transacted there have prevented the effects from being felt to so great an extent as in the provinces.

Whilst localisation has thus affected the legal profession, it has not been without its influence on the general public. It has brought quite a new class into the provincial towns, which must have an influence both as regards local and political movements and the mere society of the place. The attorney of the local town has been a conspicuous feature of the social and political life of the provinces for many years. He has been so marked a characteristic that scarcely a single modern novelist has omitted to employ him. Every one who has read George Elliot's novels, for example, is familiar with the astute Wakem and the handsome Jermyn. But no novelist has yet described the local barrister, though he is rapidly becoming as much a member of provincial society as the solicitor. It should be that the addition of this class is a distinct gain to the localities; for most of those who go to the Bar are men of good education, probably rather above the average in the way of intellect, and who have been brought into contact in their student days or at the beginning of their legal career with men of various characters and attainments. The influx of such a class into a provincial centre should thus be a gain to the community, whether it be regarded from the point of view of a self-governing community or from the narrower standpoint of what is called and understood by Society. But it must be confessed that there are a few local and metropolitan barristers who are not likely to raise the tone of any with

whom they may come into contact, nor to increase the reputation of the profession to which they belong. It is the fact that these second-class practitioners are now recognised as barristers which has helped to lower the status of the Bar. The kind of social glamour which no long time ago used to surround barristers, especially in local places, has consequently wholly disappeared, and they are recognised for the most part as very ordinary men of business, some of higher personal standing from education, attainments, and character than others. But no one can properly now for a moment suppose that local barristers stand any higher in the opinion of the general local public than solicitors. In large towns members of the best firms are in more close and confidential intercourse with the men of business of the highest class than are barristers. The active local barrister may one day be acting for a great mercantile firm and the next for a Jew pawnbroker, but if the latter comes to the high class solicitor, which is very unlikely, the services of a clerk are at his disposal. Hence the result of localisation to members of the Bar has been the equalising in public opinion of the two branches of the profession, and it cannot be doubted that the nearer in public standing these two branches are brought the more probable is the fusion of the branches into a single profession. It must be obvious that in many respects the interests of local barristers and local solicitors are more akin than those of London barristers and local barristers. Consequently localisation has somewhat divided the Bar, while uniting a section of it with a section of solicitors. It is true that, so far as Common Law practitioners are concerned, the circuit system still continues in a modified and enfeebled form; but it is absurd to suppose that an active and numerous local Bar, such as exists for example at Birmingham, can be more than nominally controlled by the old circuit system, or that circuit authorities can have much real influence over local practitioners. It must certainly be only a question of time for the several local Bars to form themselves into such compact societies as exist in France with a regular *bâtonnier* or leader so as to give corporate expression to the views of the members on legal reforms or legal etiquette. Nothing can be more anomalous than the existing system of an aggregation of a number of men of one particular profession in a particular place without organisation and without the means of giving any corporate and influential opinion on subjects which may be of the most vital importance to them, and quite unable to restrain lax practices among their members. This absence of union is the more striking because in every large provincial town there exists a 'union' of solicitors. It is true that there is for the Bar 'the Circuit,' which

is a corporate body, but, as we have pointed out, this is powerless to control local practitioners and cannot give effective expression to the views of local barristers. It may have a certain value as representing the opinion of a section of the Bar on subjects on which there can be little difference of opinion, but otherwise it is simply a social arrangement, in other respects of merely antiquarian interest.

This diffusion of the Bar so much more largely throughout England, the way in which it is brought more into contact with the public, and the more purely business way in which it is regarded both by lawyers themselves and by the public, has inevitably produced a change in the status of Queen's Counsel. They are regarded both by lawyers and the public, not as in any sense a higher social and professional grade of men, but simply as certain lawyers whose functions are somewhat different from 'juniors' and solicitors. The very parlance of lawyers, by which barristers are uniformly termed 'juniors' and 'leaders,' expresses tersely and well the general idea on the subject, and shows how the functions of these two divisions are regarded. This levelling tendency is what might be expected at the present day, and is in itself no evil. But it is an evil when the antiquarian view of Queen's Counsel is preserved by the Lord Chancellor for the time being, and he exercises an arbitrary judgment as to the creation of new members of that body. Even in the old days the evil was not absent. Everybody knows how the first Lord Denman was denied a silk gown by Lord Eldon through the action he had taken as an adviser of Queen Charlotte. At the present time it is difficult enough for a Chancellor who cannot be in close contact with the Bar to choose judges, but when he has also to select or reject barristers as Queen's Counsel from among those juniors who may apply to him the task is most invidious and quite an anachronism. A barrister who from the nature of his business, his health, or his private means may desire to do work or to retire from work in this other division of the bar, ought to have as much right to do so as a young man who wishes to enter an Inn of Court and become a barrister has to be called to the Bar. There is absolutely no more reason why the rights of existing leaders should be protected than those of existing juniors. The sole reason of any validity for the retention of the Chancellor's power would be to keep a high professional order select, so that entry into it should confer a kind of professional dignity on the person who obtains it, as the conferring of the Cross of the Bath confers a cachet of merit on a soldier. But when by the nature of things the order in question does not confer any particular dignity on a man, when it simply marks a class of professional persons, just as a membership of the Institute of

Surveyors or Actuaries marks the line of work of the holder, it is preposterous for a Lord Chancellor to continue to exercise a veto on the obtaining of this place. That it cannot long be continued is perfectly obvious, and no survey of the position and prospects of the legal profession would be complete without pointing out the existing state of this matter.

There is another characteristic of the legal profession, more especially of the Bar at the present day, which deserves notice, as it is one which is likely to increase to some extent, but certainly to become more marked. This is what may be called specialism, the devoting by small groups of barristers of their attention to particular and special subjects. It is a perfectly natural development of the legal as it is of the medical profession, having regard to the increase and complexity of modern business and modern science. It is on the one hand a cause of difficulty to beginners, and on the other of hope. For if it is difficult to enter into any particular group, it is probable that by perseverance and fitness an entry will one day be obtained; and having been obtained, success, to those who desire it, may be easier. There has been of course specialism in existence of a limited kind for a great number of years. The advocates of Doctors Commons long had the monopoly of ecclesiastical business and that which is now transacted in the Probate and Divorce Courts. But specialism now exists in regard to many more subjects, and must be regarded as a far more important and noteworthy feature of the legal profession. There were some who supposed that, when the several Courts were not only amalgamated, but housed under one roof, the distinction between Chancery and Common Law barristers would to some extent cease. But the new system has been in force with its common code of procedure for more than ten years, and there has not only not been the slightest appreciable abandonment of distinct modes of work, but on the contrary, as has been already pointed out, specialism has become more marked.

When this division of work is so obviously on the increase, it is difficult to believe that the fusion of barristers and solicitors into one body is likely to take place. Such a fusion would be contrary to the tendency of the times, and this is a much more important factor than the speeches of a certain number of persons who consider it desirable that such an amalgamation should be accomplished. It is obvious that the change can only be brought about if the general public believe that it would be to their advantage, and if persons of weight and authority outside the legal profession set to work to produce it. As soon as things had settled down after the accomplishment of the change, if the change occurred, it is

certain that the general body of lawyers would be in the same position as they now are so far as money-making was concerned. If it were produced by a belief on the part of the public that they would save money by it, and if that opinion were correct, which we do not think it is, then such saving to the public would be so much loss to the lawyers. Hence it is quite clear that by any such change the general body of lawyers cannot possibly gain anything and may lose something. This being so, and the general body being quite aware of this fact, and there being as yet no real public wish for the amalgamation, it is impossible to believe that the endeavours of a small proportion of one branch of the legal profession are likely to bring about this change. Of course if it were certain that the public had anything to gain by this alteration of the legal profession, it might fairly be assumed that sooner or later the change would be accomplished. We have already seen that from the necessity of things division of labour is on the increase, and therefore it is certain that this class of advocates by whatever name they might be called will continue, and will also continue to receive fees for work in Court as they now do. It is equally certain that an advocate must have something in the nature of a brief prepared for him, so that there must be some cost on this head. It may be said that the brief would not have to be so elaborate an article as it frequently is now, but there is some difficulty in supposing that this would be so, because most barristers in practice will testify that the elaborate and lengthy briefs with which they are from time to time presented would gladly be exchanged for something shorter and more concise. As a matter of fact, solicitors waste a great deal of their clients' money by telling at great length the story of the case, and by making endless observations on the effect of the evidence. All that is required is the evidence with a very short statement of the point of the case, which is now generally sufficiently given in the pleadings. It may perhaps be said that this is a consequence of the system, and that if the system were altered the consequence of it would cease. But we see no reason to suppose that over-lengthy briefs are likely to be put an end to if the fusion of the two branches takes place. As to the expenses—of witnesses, of fees, of correspondence and interviews, which form the bulk of the cost of litigation, all this must necessarily continue. So that even assuming something were saved in the preparation of briefs, we cannot believe that the public would ever consider it worth while to agitate for a change to produce so small a result, one which, whatever the public belief, would be found not to exist when the change had taken place. It is obvious that, whether the fusion comes to pass or not, its probability must be

considered, if we wish to ascertain the existing state of the legal profession.

If we endeavour to escape from the merely professional view of the lawyer and to form some estimate of the general tone of the legal mind at the present day, the judgment of most will be that this tone is broader and more robust than it used to be. This is due to various causes. The abolition of the more abstruse technicalities of pleading and conveyancing, which were essentially narrowing in their tendency, has caused lawyers to take a broader view of things. To this must be added the influence of the Bench, the more powerful occupants of which have endeavoured to take what may be termed a common-sense view of the law. The late Master of the Rolls was an eminent example of this new school of judicial thought, as witness his criticism in *Couldery v. Bartrum* of the law in regard to compositions with creditors.

The present holder of the same office, though less caustic and epigrammatic in his judgments, views the law from essentially the same stand-point. The daily influence of judgments which, however much they may differ in their subject-matter, are permeated by the same legal feeling, cannot fail to have a certain, though it may be an almost imperceptible effect on the general tone of legal thought.

To the above element must be added the influence of the new school of legal writers, of whom Sir James Stephen is the most eminent instance. Their influence is already apparent in a gradual codification of English law, though not at the instance of the Government of the day. Liberal and Conservative Governments have in vain tried to pass a code of criminal law and procedure, and thought of a code of evidence. Yet the Institute of Bankers has practically obtained the codification of the law of Bills of Exchange; the Act which contains this code being an instance of the effect of the influence which a legal writer and a powerful commercial body may have on the form of the law. It is improbable that, without Judge Chalmers' Digest, the bankers would have endeavoured to obtain a code of this branch of the law; it is equally certain, that, without the influence of the bankers, Judge Chalmers' Digest would yet remain an example of skilful work by a practised lawyer, but would not form part of the Statutes of the realm.

Again, the vast mass of reported decisions which now load the bookshelves of every lawyer has gone far to lower the value of reports. Main principles as a rule are now abundantly settled, and consequently legal decisions are now, generally speaking, either confirmative of more ancient ones, or are on side-points of lesser importance, or are on the construction of some of our numerous Statutes. If a careful résumé were made of reported decisions, it would soon become evident

that if this last class of cases was expunged the legal reports would be very largely reduced in size. But a report which decides the particular construction of some part of a section of some Act, however useful as a gloss on that Act, is not a report which really adds to the general storehouse of the law. The result is, that a solid acquaintance with general principles has begun to be more sought for than a knowledge of legal decisions, which no mind can now carry in their entirety. When legal decisions become unreasonably numerous the Case lawyer—the man whose knowledge of the law largely consists in a knowledge of particular cases—ceases to be ‘the good lawyer’ of past times, when a knowledge of cases was synonymous with a knowledge of main legal principles with an apt example of their application. If to this be added the vast decrease in the proportion which disputes as to land now bear to the whole mass of litigation, and the diminution in real property learning, and the proportionate increase in litigation arising out of mercantile and business transactions, the difference in the tone of the legal mind is not in the least astonishing. It is equally certain that when such a state of things is reached the time has also come for a systematic and vigorous attempt by high legal authorities to codify the various branches of our municipal law. When such codification takes place, and everything points to the probability that within a few years there will be a considerable part of English municipal law codified, as a sequel to the existing code of civil procedure formed by the Judicature Acts and Rules, the Bar will hardly be able to be considered a more ‘learned’ branch of the profession than the solicitors. It is certain that the Judicature Acts and Rules as a code of procedure will not have been without influence in producing the codification of other parts of our municipal law. If the codification of procedure makes more probable the codification of the law, it shows how one change helps to produce another, and by what a number of different influences the position, the prospects, and the character of the legal profession, not only in this but in any other country, may be affected.

E. S. ROSCOR.



## THE SEISIN OF CHATELS.

**T**HERE is hardly a rule of our legal terminology better settled than that which is broken by the title of this paper. There is no such thing known to our law as the seisin of chattels; one may be seised of land, but of a chattel, real or personal, one shall be possessed, not seised. Of course, one may seize chattels, and between seizure and seisin the etymologist may see a close connection, but he that would commit a really bad blunder let him speak of the seisin of chattels.

Seemingly, it has been the general opinion that this distinction, now well marked, between possession and seisin is of very ancient date, an outline of immemorial common law, and could we accept one common description or definition of seisin this opinion would be forced upon us as inevitable. 'Seisin,' said Lord Mansfield<sup>1</sup>, and his words have passed into the text-books, 'is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. *Sciendum est feudum, sine investitura, nullo modo constitui posse. Feud. lib. 1, tit. 25; lib. 2, tit. 1; 2 Craig. lib. 2, tit. 2.*' Here seisin appears as a distinctly feudal notion, and the question why there is no seisin of chattels is answered at once:—There is no tenure of movables, and the termor has no fee or feud. But it will have occurred to many readers as a little strange that Lord Mansfield, instead of vouching some English writer, Glanvill or Bracton, Littleton or Coke, to warrant what he thus said about a word which, for many centuries, had been constantly in the mouths of English lawyers, should have appealed to certain ancient Lombards and a modern Scotchman. The truth seems to be that there was no old English authority available for the purpose. Seisin is possession; that is what Bracton says at the outset, that is what Coke says at the close of the mediæval period; one and the other would have been surprised to hear that any act or consent on the lord's part is necessary to constitute seisin.

Now, it can, as I believe, be shown that the notion of seisin, so far from having any very close connection with those ideas and institutions which we call feudal, had not even any exclusive reference to land. From time whereof there is no memory until the fifteenth century was no longer very young, English lawyers often, and in some contexts habitually, spoke about and pleaded

<sup>1</sup> *Taylor dem. Atkins v. Horde*, 1 Burr. 107.

about the seisin of chattels. Attempt will here be made to prove this assertion. The question is not one barely about the use of words. The gulf between what we call real property, and what we call personal property, is so wide and deep and ancient that we are constantly tempted to overrate its width, depth, and antiquity, and thus, perhaps, we sometimes miss important points in the history of the law. We shall hardly understand all that may be understood of that history, if we steadily refuse to bring land and goods into any relation with each other. Especially is this true when we are dealing with possession or seisin. Seisin and disseisin seem so mysterious a matter that, in despair of rational explanation, we are glad to have so satisfactory a word as feudalism wherewith to hush the questioner. It may be possible, however, that some of the mystery might be even more effectually dispelled if we understood what our old law said about the possession of goods, and from possibility we might pass to probability, if we really found that it was once a common thing to be seised of goods.

Having to argue for a conclusion which, perhaps, runs counter to general belief, a considerable mass of evidence must be pleaded. The argument should be guarded against two objections. It must be made clear that we are not confusing seisin with seizure, seizing with being seised. It must be made clear that we have not fallen into a trap set for us by some pleader's blunder, some reporter's carelessness, or some text-writer's whim, but are tracing an orthodox and habitual use of words. While, however, the reader's patience is begged for a number of citations and references, he must be asked not to expect too much. The mass of our printed information concerning the treatment of chattels in the thirteenth and fourteenth centuries is small indeed, when compared with the vast bulk of materials for a history of real property, and for the more part we shall be forced to rely on replevin cases in which the possession of chattels is just mentioned, but the whole argument turns on the title to land or rent.

We will take just one step beyond the limit of legal memory in order to notice the *Leges Henrici Primi*. There we find two phrases which we shall meet elsewhere. The thief who is taken with the mainour is *de furto seisiatus* (cap. 26). When a man has been distrained he is to be allowed to replevy his goods, *et seisiatus placitet*, that is, as I understand, he need not plead until he is seised (cap. 29, § 2).

We pass from this instructive apocrypha to the first book in the orthodox canon. Glanvill twice has occasion to mention possession of goods; each time he calls it *seisina*. The pledgee of movables may have seisin of them—*cum itaque res mobiles ponuntur in vadium*

*ita quod creditori inde fiat seisin* (lib. 10, cap. 6). The plaintiff in an assize of novel disseisin recovers seisin of the land and seisin of his chattels also, *seisinam omnium catallorum* (lib. 13, cap. 9).

In Bracton there is very much to be read of *seisina* and *possessio*, and to me it seems that he uses the two words as precisely equivalent, though, perhaps, for him *seisina* is the vulgar word, *possessio* the technical and correct Latin term to be found in the Roman law books. We shall return to this hereafter, when we speak of chattels real. Bracton has hardly ever occasion to mention the possession of movables, but with him, as with the writer of the *Leges Henrici*, the hand-having back-bearing thief is *seisitus de latrocinio*, and is *in seisin* (fol. 150 b, 154 b). Fleta (fol. 54, 62) copies, Britton (vol. i. p. 56) translates these phrases. There can be no prosecution in the court of a lord having franchise of infangthief, unless the accused *de rebus insecutis fuerint seisis*; in other words it is only over *mesfours troves seisis* that such a lord has jurisdiction. Clearly, to say that a thief was taken *seisitus de furto*, or *seisitus de latrocinio*, was to use a technical phrase about an important point. It is used in the Assize of Clarendon—‘*si aliquis fuerit captus qui fuerit seisiatus de roberia vel latrocinio.*’ Bracton again (fol. 122) says that if the coroner hears of treasure trove he must inquire *si aliquis inde inventus sit seisitus*. Elsewhere (fol. 440 b) he discusses what is to be done if the defendant in an action of debt will not appear; his suggestion is, *bonum esset adjudicare querenti ab initio seisinam catallorum secundum quantitatem debiti petiti*.

Between Glanvill and Bracton we might have noticed an entry in the *Placitorum Abbreviatio* (p. 12) of Richard the First's time. The roll of the King's Court says that the wax in question has been replevied, and that he whose it was is seised of it (*cera illa fuit replegiata et ille cujus illa fuit est inde seisis*). Just from Bracton's time the same book gives a count in trespass, which charges the defendant with having sent his men to violently interrupt the proceedings of a jury, *et de quodam juratore abstulerunt quemdam gladium et adhuc sunt in seisin de eodem gladio* (p. 129, Mich. 37 & 38 Hen. III).

An examination of rolls belonging to the first years of Henry the Third has supplied a dozen criminal cases in which the seisin (always *seisina* and never *possessio*) of chattels is treated as a most important matter. It is just a question of life and death whether the thief was taken in seisin of the stolen goods (*seisitus de bonis furatis*), whether the manslayer was taken in seisin of the murderous weapon (*seisitus de cnpulo sanguinolento*). If he was seised he can be hanged offhand; if he was not seised, then, unless he will put himself upon his country, he cannot even be tried, he can only be kept in custody.

Sometimes a phrase that is yet more 'feudal' is found, the thief was 'vested and seised' of the stolen goods. The Mayor and bailiffs of Wallingford took a man vested and seised of an instrument for clipping coins:—*invenerunt ipsi predictum Johannem vestitum et seisitum de seisina illa*; he of course denied the seisin, *deffendit saisinam illam*<sup>1</sup>. Another man had stolen tin at Bodmin; the appellor saw him vested and seised of the tin and burying it in the ground:—*ipsum vidit vestitum et seisitum de stagno furato*<sup>2</sup>. One other case<sup>3</sup> is noticeable for many reasons. The justices in eyre who went to Devonshire in 1218 hanged two men for receiving stolen goods. Their sons appealed to the king against the consequent forfeiture—'et quia videtur consilio domini regis et iusticiariis de banco quod male et iniuste suspensi fuerunt eo quod non fuerunt seisiti de aliquo furto vel roberia, nec aliquam roberiam cognoverunt, nec per dictum iuratorum potuerunt de iure dampnari, consideratum est quod heredes eorum non exheredentur, et ideo preceptum est vicecomiti quod eis terram suam habere faciat etc., et iusticiarii in misericordia'! Justices at this date had occasion to know something about the seisin of chattels. As to *possessio* and *possideo*, I have never yet found these words on any of these early rolls save in one context. The exception is instructive:—the parson possesses (*possidet*) the church. Here we touch the domain of the Canon Law; the fact of possession is to be established by the bishop's certificate. But we will go back to the evidence already in print, which really is sufficient for our purpose<sup>4</sup>.

The recently printed Year Books of Edward the First give us several examples. I quote Mr. Horwood's translations.

21 & 22 Edwd. I, p. 10. Note, that in the Replegiari, the plea ought not to proceed while he who took the beasts is seised of what he took (*est seysy de la prise*).

21 & 22 Edwd. I, p. 20. Note, that where one complains that B. tortiously took his chattels, such as corn or other chattels (except beasts), he ought to mention the value, but there is no need to mention the value of beasts, although the taker is still seised of the beasts (*tut seyt le pernur uncore sessi de les avers*).

<sup>1</sup> Roll for Michaelmas Term, 5 & 6 Hen. III. (known at the Record Office as *Coram Rege Roll*, Hen. III. No. 12), memb. 12. What he was seised of was a *tonsura*. I gather from the context that this means an instrument for clipping. See Ducange, s. v. *tonsura*.

<sup>2</sup> Ibid. memb. 14.

<sup>3</sup> Roll for Michaelmas Term, 3 & 4 Hen. III. (*Coram Rege Roll*, Hen. III. No. 3), memb. 15, dore.

<sup>4</sup> There is a note about the seisin of stolen goods in MS. Add. 12,269, the note-book discovered by Prof. Vinogradoff; this I have copied in *Pleas of the Crown, Gloucester*, 1221, p. 152.

21 & 22 Edwd. I, p. 56. Note, that where, in an action for taking of beasts, one counts against the lord, and the lord is seised of the beasts (*e le seynur seyt seysi de avers*), and avows the taking, there is no need for the plaintiff to reply to the avowry until he has the deliverance made.

The rule laid down by the first and third of these passages is that which seems to be indicated by the *seisiatus placitet* of the *Leges Henrici*. If goods have been taken in distress they must be delivered to the claimant or security must be given for their delivery before he pleads to the avowry, and so *seisiatus placitet*. The second passage gives us the phrase *uncore seisi*, used to describe the distrainer when no deliverance has yet been made. That phrase will haunt us for some time to come.

21 & 22 Edwd. I, p. 589. Trespass for taking thirty swans. Plea the plaintiff himself is seised of the swans (*seysy de synes*).

32 & 33 Edwd. I, p. 197. Replevin; the plaintiff says that the defendant is still seised of the beasts (*uncore seisi de nos avers*).

It is only with the greatest caution that one may cite the *Mirror of Justices*. The author of that book, who probably wrote in Edward the First's reign, was moved by a bitter hatred of the King's judges, who, in his opinion, were distorting the ancient law and oppressing the people. Unfortunately, he was not content with stating his grievances, but chose to propagate a mass of fables about King Alfred and the old law. The book has never been carefully edited or thoroughly examined, and possibly its writer may hereafter be acquitted of that charge of wilful dishonesty which his would-be quotations from imaginary records very naturally provoke. But it is just worth notice that he speaks<sup>1</sup>, in one and the same breath, of seisin and livery of seisin of lands and goods, and argues that the purchaser of goods ought to be considered as seised of the goods so soon as the vendor has quitted them. Livery of seisin is seemingly necessary to perfect the sale of a horse; and the author, unless I have misunderstood him, complains that a brief but actual seisin by the purchaser has not been considered sufficient.

We have now to face the series of Year Books stretching, with some breaks, from Edward the Second to Henry the Eighth.

Hil., 14 Edwd. II, fol. 421. Count in replevin, the defendant has taken beasts *et uncore est seisi*.

Mich., 18 Edwd. II, fol. 561. Similar count, *vous estes ungore seisi*.

<sup>1</sup> Cap. 5, sec. 1, § 73.

- Hil., 10 Edwd. III, fol. 5, pl. 14. Similar count, *et dit que il fuist uncore seisi des avers.*
- Hil., 21 Edwd. III, fol. 51, pl. 3. Similar count, *et counta que il fut encore saisi del' boef.*
- Mich., 38 Edwd. III, fol. 22. Trespass: the lord who has taken a heriot says, that because it was the best beast *nous le seisismes apres la mort G. et fuimes seisis tanque vous,* etc.
- Hil., 39 Edwd. III, fol. 4. The king has been seized of an estray, *ad este seisi*, for a year and day.
- Hil., 42 Edwd. III, fol. 6, pl. 18. Plaintiff counts that the defendant has arrested his wool *et adhuc in arrestatione detinet.* Plea, the plaintiff himself *ceo jour est seisie de les biens.*
- Mich., 47 Edwd. III, fol. 23, pl. 55. Plea in trespass de bonis aportatis: *un J. W. fuit seisie de mesmes les chateaux, et morust seisie, et fist mesme cestuy R. son executor, le quel seisist les chateaux.* In the discussion, possession and seisin are used indiscriminately.
- Mich., 6 Rich. II [Fitz. Abr. tit. *Replication*, pl. 60]. *Nostre testatour morust seisi de mesme les biens apres que mort nous les happamus et de eux seisi fuomus tanque les defendants les pristrent hors de nostre possession.* Three times in a brief note occurs this phrase—*morust seisi de mesmes les biens.* Must we not say, with the reporter, *issint vide que moreant seisi de biens est material?*
- Pasch., 7 Hen. IV, fol. 15, pl. 20. *Il mesme est seisie de mesmes les biens.*
- Mich., 11 Hen. IV, fol. 2, pl. 4. *Il detient uncore nos berbits et est seisie.*

This phrase, *still seised*, with which we are now becoming familiar, occurs also in a petition to the King in Parliament of 1321-2. The parson of Kippax, in Yorkshire, complains that certain persons have driven off his horses and sheep, and that the beasts have come to the hands of the Earl of Arundel's bailiffs, who *uncor sunt seisis de eux.* (Rot. Parl. vol. i. p. 394, no. 41.)

I have not cited by any means all the instances in the books of Edward the Second and Edward the Third that have caught my eye, but I have probably cited quite enough to show that in the fourteenth century it was common to speak of a man as seised of movables. There is a long, and I think unbroken, line of cases which show that the usual form of a count in replevin, when the beasts had not yet been delivered, stated that the distrainer was still seised of the beasts. But some of our examples will prove that similar phrases were used in other contexts. It was quite

right to say, for example, that a testator died seised of goods, and that afterwards his executors were seised.

But now there begins a change in the terms used in replevin cases. In Pasch., 7 Hen. IV, fol. 11, pl. 2, we find *il detient a tort*, where, according to precedent, we should have expected *uncore seisi*. But the struggle between the two phrases is not yet over. Twice in the early years of Henry the Sixth we meet with the older term.

Mich., 3 Hen. VI, fol. 15, pl. 20. *Nous vous disons que le defendant est uncore seisi de les avers.*

*Nous disons que vous mesmes estes seisis de eux.*

Hil., 4 Hen. VI, fol. 13, pl. 11. *Le defendant est uncore seisi del laure.*

These are the last instances that I have at hand. From this time onwards *uncore seisi* seems definitely supplanted by *uncore detient*. Thus we have:—

Pasch., 21 Hen. VI, fol. 40, pl. 8. *Il uncore detient nos bestes.*

Hil., 1 Hen. VII, fol. 11, pl. 16. *Il uncore detient.*

Mich., 5 Hen. VII, fol. 9, pl. 21. *Et le plaintiff counta sur un Uncore detient.*

I have kept back to the last, perhaps the most striking piece of evidence, because of its somewhat uncertain date. The *Novae Narrationes* is a brief collection of precedents for counts or declarations in French. It was printed by Pynson without date<sup>1</sup>, and was more than once reprinted. Coke in one of his prefaces (3 Rep.) puts it into a class of old books along with Glanvill, Bracton, Britton, Fleta and Hengham, which he distinguishes from a class of newer books, comprehending the *Old Tenures*, the *Old Natura Brevium* and *Littleton*. In another of his prefaces (10 Rep.) he says that the *Novae Narrationes* was published 'about the reign of King Edw. III.' The Latin version of the same preface has the more definite '*juxta initium regni Regis Edw. 3 in lucem prodiit.*' This date, however, is too early for the book as printed, for just at the end of it there is a declaration on the Statute of Labourers, which declaration is supposed to be made after the third year of Richard the Second. More about its date I cannot say. Near the end of Henry the Sixth's reign<sup>2</sup> the judges treat *Les Novels Tales* as a very high authority. Coke says that the book to which they refer is the work now in question, the *Novae Narrationes*.

Now, this book contains a precedent for a count in replevin, which describes the distrainer as still seised, *unquore seisi*<sup>3</sup>. There is also a count in detinue by the purchaser of a cow, who has paid

<sup>1</sup> '1515' Cat. Brit. Mus.

<sup>2</sup> Mich., 39 Hen. VI, fol. 30, pl. 43.

<sup>3</sup> Ed. 1561, fol. 62 b.

a penny in earnest (*en arras*), and it sets forth that *cesty A. luy bailla un denier en arras, et del denier il fuit seisie*<sup>1</sup>.

The appearance of such phrases in a book of precedents is strong evidence that they were at least permissible, but I am not sure that it is stronger evidence than that afforded by the Year Books. It should not be forgotten that some of the instances above cited come from a time when pleadings were jealously scanned, in the hope that some verbal flaw might be detected in them; but though it is easy to find examples of objections, and successful objections, which seem to us very captious and unreasonable, I have not met with any instance in which exception is taken to the use of this word seised in connection with chattels, personal or real.

Now, however, we must cite the decisive passage in Littleton's Tenures (sec. 324), which proclaims once and for all that the differentiation between seisin and possession has taken place:—

'Also, when a man [in pleading<sup>2</sup>] will show a feoffment made to him, or a gift in tail, or a lease for life of any lands or tenements, then he shall say, by force of which feoffment, gift, or lease, he was seised, &c., but where one will plead a lease or grant made to him of a chattel, real or personal, then he shall say, by force of which he was possessed, &c.'

Littleton, it is supposed, wrote between 1474 and 1481. We have brought down our series of counts in replevin containing the words *uncore seisi* to 1426. The series containing *uncore detient* begins in 1443. Of course very little stress should be laid on these dates, for many cases may have been overlooked, and it would be easy to draw false inferences from the casual use of a phrase. Still the evidence tends to show that there had been a change in the terms used in pleading, just long enough before Littleton's day to make his express statement intelligible.

We have not yet spoken of chattels real, and will in this instance reverse our procedure and work from the latest authority to the earlier. And here the first witness to be called is Littleton himself, for he says (sec. 567), 'Also if a man letteth tenements for term of years by force of which lease the lessee is seised,' thus himself using the very phrase that he has condemned as incorrect. We shall easily pardon this slip if we look to the older authorities, for at worst it was an archaism.

What we should expect in such a context of course is 'by force of which he is possessed,' or, in the orthodox law Latin, '*virtute cujus possessionatus est.*' Just about Littleton's time we find this phrase in the Year Books.

<sup>1</sup> Fol. 68.

<sup>2</sup> The words in brackets are in some very old editions.



Mich., 21 Edwd. IV, fol. 10, pl. 1. *Par force de quel il fuit possesse.* But some seventy years earlier the other phrase occurs;

Pasch., 1 Hen. V, fol. 3, pl. 3. Count in Ejectione firmæ: lease for twenty years, *par force de quel il fuit seisi.*

In the earlier Year Books there are very few instances in which a leaseholder pleads his title; but, skipping a century, we have

Mich., 6 Edwd. II, fol. 177. Count in Quare ejecit: lease for ten years, *par quel leze A. fuit seisi.*

Mich., 3 Edwd. II, fol. 49. Count in Covenant by lessee; lease for 10 years to A., *par quel leze il fuit seisi ii anz.*

Instances from the reign of Edward the First are still plainer:—

32 & 33 Edwd. I, p. 529. Covenant; count by a lessee on a lease for five years of the provostship of Derby; the count, as enrolled in Latin, states that the lessees were *seisiti*.

30 & 31 Edwd. I, p. 142. Covenant; count that J. leased the land to Roger for eight years *par quel leze il fut seisy* for a certain time, and that then Roger leased to Robert *par queus leze il fut seisy* for four weeks.

21 & 22 Edwd. I, p. 23. Count in covenant by lessee of a rent; lease for ten years *par queu les yl fut seysy de cele par deus anz.*

20 & 21 Edwd. I, p. 254. Covenant by lessee; defendant says that by virtue of a lease for twenty years the plaintiff *fut seysy*.

20 & 21 Edwd. I, p. 278. Covenant by lessee's son; lease for twenty years to my father, *par quel les yl fut seysy un an.*

It will occur to the reader, that the value of this evidence depends on the comparative frequency of the words *seised* and *possessed* in counts by leaseholders; I must say therefore, that while I can produce, from the Year Books of the two first Edwards, seven examples of pleadings which describe the termor as seised, I have not found one in which he pleads that he is possessed. Certainly, my investigations have been far from exhaustive, and have consisted rather in following the references given in indices and abridgements under hopeful headings, than in fairly reading from cover to cover, but unless, round about the year 1300, it was strictly and technically correct to plead that a termor is seised by force of his lease, I have had a very strange run of bad luck.

Lastly, we may again refer to the Novæ Narrationes and there find several precedents of Covenant, Quare ejecit, and Ejectione firmæ, in which the termors are made to say that they are seised. Thus, Hubert Mappe leased a messuage to Adam Pye for a term of years not yet ended, *per qui le dit Adam fuit seisy del mees avauudit.*

On the other hand, in one of the precedents the termor is said to have been in peaceable *possession*. It is noticeable that this is a precedent in *Ejectione firmæ*, a specialised form of trespass *vi et armis*, and a newer remedy for the termor than the *Quare ejecit*, or the still older writ of covenant. This would lead us to believe that it did not become definitely wrong to speak of the termor as seised until after the end of the fourteenth century, and we have seen one precedent which contains the objectionable phrase in the Year Book of 1413.

Here again, then, our evidence points to the fifteenth century as the time when the distinction was first firmly established. But probably the differentiation was a gradual process. At first *possessio* and *seisina* are the same thing. Take two very old maxims with which all lawyers are still well acquainted. If we ask why *possessio fratris de feodo simplici facit sororem esse hæredem*, the answer is because *seisina facit stipitem*. But gradually, as it seems to me, the words become appropriated, and the lawyers in the Year Books, though, in pleading, they will speak of a man as seised of chattels, begin to talk of possession directly they begin to argue. It looks as if *seised* was becoming an antiquated word to use of chattels, a word which one might still have to use in formal pleading, but one which struck the ear as antiquated, or, perhaps, even incorrect. But what flaw could be seen in it? The answer will probably be found in the curious history of leaseholds, for the beginning of which we may look in Bracton's book.

Now Bracton, as already said, has to mention *possessio* and *seisina* a very large number of times, and always treats them as interchangeable; as Dr. Güterbock has well said<sup>1</sup>, beide Worte werden promiscue gebraucht. His definition of *possessio* is founded on the Roman authorities, but is taken directly from the Italian lawyer Azo. *Possessio est corporalis rei detentio, i. e. corporis et animi cum juris adminiculo concurrente* (fol. 38 b). Now, whatever Azo may have meant by this requirement of *juris adminiculum* (and he seems to have thought it necessary in order to include certain cases of constructive possession), seemingly Bracton meant no more than that there are certain persons and things, such as free men and things sacred, of which there can be no possession (fol. 44 b). In general, he remains quite faithful to the notion that *seisin* or possession is pure matter of fact, the detention by body and mind of a corporeal thing. Nor is this mere Roman ornament, which can be stripped off without damage to the fabric of English law as reared by Bracton, for on this depends his whole learning about the scope

<sup>1</sup> Henricus de Bracton, p. 59.

of that commonest of all actions the assize of novel disseisin. Lord Mansfield's theory that seisin implies some act or concurrence on the lord's part most certainly is not Bracton's theory. Seisin with him is simply possession, and has little to do with homage or fealty<sup>1</sup>.

It is, of course, possible that Bracton's very rational account of seisin is just a little too rational, but we have the clearest proof that it is not mere romance, and we may doubt whether on any other part of our law the Latin learning of the thirteenth century made so practical and so permanent an impression. We have, happily, now in print a considerable collection of assizes taken during that period, and they constantly put before us seisin as simply and merely possession, a matter of fact independent of feudal relationships and institutions. When the question is whether a certain person was seised, if there be any mention at all of homage or fealty, of suit or service (and such mention is comparatively rare), these matters are treated, not as constituting seisin, but as being evidence of seisin, evidence tending to prove that this man or that was really possessor. Roger Clifford, for example, in the 36th of Henry the Third, brings an assize of mort d'ancestor against his younger brother, Geoffrey. Geoffrey pleads a gift made to him by their father, John, in his lifetime. Roger replies that the gift is naught, because John never really gave up possession to Geoffrey. The words are remarkable: *quia quamvis Johannes pater ipsorum terram illam ei [Galfrido] dedisset per cartam, nunquam se dimisit de terra illa corpore nec animo*. Then the assize finds the facts at length, and, among them, that John went on doing suit for the land after the gift. This is put before the court, not as conclusive, but as one of many facts which prove that John never ceased to possess, though he went through the idle form of going off the land and sleeping somewhere else for a night. (*Placit. Abbrev.*, p. 128<sup>2</sup>). This is a type of a considerable class of cases. Having no testamentary power, landowners will try both to give and to keep. The court deals with such cases in a most reasonable way; full statements of the relevant facts are obtained from the assize, and the decisions are really no more dictated by feudalism, in any sense of that hard-worked word, than are modern decisions about voluntary settlements. Doubtless, there was a constant tendency

<sup>1</sup> See Butler's note to Co. Lit. 330 b. Dr. Heusler (*Die Gewere*, p. 441), whose work I had not seen when I wrote the above, says that Bracton's seisin is *Besitz einfach und schlechtweg*. This seems to me perfectly true. I am happy in being able to add that in the last number of this Review Mr. Robert Campbell (p. 186) and Mr. Justice Holmes (p. 168) have written what makes for the same end.

<sup>2</sup> I have seen this case on the roll. It was heard by Bracton himself, and perhaps the *romanesque tag* (*corpore nec animo*) may come from him.

to make seisin a matter of forms and ceremonies, of sacramental acts with rod or twig or hasp of door. So long as possession has legal consequences some persons will always be trying to substitute mummary for the real thing. 'Of which goods and chattels, I, the said T. A., have put the said F. C. in full possession by delivering to him one chair;' the date of this formula is not 1268 but 1868<sup>1</sup>. But the thirteenth century decisions on the question, seised or not seised, show a remarkable disregard for formalities, a remarkable determination to make that seisin which the law protects just a real and actual possession.

But this by the way; Bracton, though he does not distinguish between seisin and possession, has another distinction which is noteworthy. He repeatedly distinguishes between being in seisin and being seised, between being in possession and possessing. One who possesses or is seised has, if ejected, the assize of novel disseisin, but a person may be in seisin or possession *nomine alieno*, and if he be ejected the possessory remedy belongs not to him, but to that other on whose behalf he was in possession. Thus, in one place he turns our modern terminology just upside down; the farmer is in seisin, but he does not possess (fol. 165); *quia longe aliud est esse in seisina, quam seisitus esse, sicut longe aliud est esse in possessione quam possidere*<sup>2</sup> (fol. 206). In the view that he generally takes the termor does not really possess, he only holds possession for his landlord, and this is the reason why he has not the possessory remedy, the assize of novel disseisin.

We are familiar with the saying that, of old, the termor was little more than his landlord's servant or bailiff. Now, it is a very natural thing indeed to say that a servant does not possess his master's lands or goods, though he has sole charge of them. Mr. Justice Holmes, in his lecture on possession, has well remarked how free-handed our old law was of its possessory remedies, how it attributed possession of goods to bailees whom the civilians would not have accounted possessors; still it drew the line above the servant who, in his master's house, has custody of his master's goods. Now, in Bracton's opinion, the termor is denied the assize, not because he has a less estate than becomes a free man (is there really any record of a free man saying that a term of years was beneath his dignity?), but because *tenet nomine alieno*; in this he resembles the *custos*, *procurator*, *usurarius*, *hospes*, *servus* (fol. 165, 167 b, 168, 206).

Bracton's adoption of this phraseology prepared a difficulty for

<sup>1</sup> L. R., 9 Eq. 511.

<sup>2</sup> *Aliud est enim possidere, longe aliud in possessione esse.* Ulpian, Dig. de acquir. vel amitt. possess. (41. 2) 10.

him which he had to meet (fol. 220) when explaining how, after all, the termor has a possessory remedy against some ejectors, and a remedy which will restore him to possession, the *Quare ejecit infra terminum*. But it seems from Bracton's own words that the difficulty was quite new, because this remedy had but recently been invented by the court (*de consilio curiae*), as a more efficient protection than the old writ of covenant. In later days tradition ascribed the invention of the new writ to Bracton's contemporary, Walter of Merton (Old *Natura Brevium*, fol. 122 b), and more than once in the Year Books the writ is noticed as an innovation. Now, so long as the writ of covenant was the termor's one remedy, it was very natural and proper to deny that he possessed; he had not a possession which the law protected, he had merely a contractual right. But the newly invented remedy had given him a sort of possession; it enabled him to recover his term if ejected, at least if the ejector was a purchaser from his lessor, and, whatever may have been the rule at a later date, Bracton apparently thought<sup>1</sup> that this writ would enable the termor to recover his term even if ejected by a stranger. In describing this remedy he has to allow the termor a sort of possession, or rather, as it happens, a sort of *seisin* (fol. 220 b). His Roman authorities suggest to him that the termor has a usufruct, that a usufruct is but a servitude, something like a right of way. This, perhaps, should have led him to say that the termor has not possession of the land, but only quasi-possession of a servitude over land possessed by another (*iuris quasi possessio*), but I do not think that he quite accepts this doctrine, and the most explicit statement to be had from him is that both lessor and lessee are in *seisin* of the tenement, the one as of his term, the other as of the freehold, *quia istae duae possessiones sese compatiuntur in una re quod unus habeat liberum tenementum et alius terminum* (fol. 13 b). Elsewhere (fol. 264) he can casually speak of tenant for years as *seisitus*.

Very probably Bracton's verbal distinction between being in *seisin* and being *seised*, between being in possession and possessing, was a little too subtle to catch the English ear; and certainly the suggestion that a termor's interest is a servitude over another's land, so that the termor is quasi-possessed of a servitude, but not possessed of land, did not take root in this country. It would have been difficult to work that suggestion into a system of law which, from the outset, most unhesitatingly gave *seisin* to the tenant for life. A student, fresh from Roman law or 'general jurispru-

<sup>1</sup> Fol. 220. Observe the words *contra quoscunque dejectores*. As to the later law see F. N. B. 197. The writ given by Bracton supposes a sale by the lessor to the ejector, but it seems to me that Bracton thought this only an example. It appears from F. N. B. to have been questionable whether the allegation of a sale was traversable.

dence,' may be puzzled when he finds Mr. Joshua Williams treating an estate in remainder or reversion as an incorporeal hereditament to be contrasted with that corporeal hereditament an estate of freehold in possession, but in our old law this seems an elementary idea of first importance; the tenant for life is not a usufructuary with only a servitude and no land; on the contrary, he has the land, it is the reversioner who has an incorporeal thing. So, I take it that for some considerable time after Bracton's day it was a matter of much uncertainty how the termor's interest should be conceived; and lawyers were free to say, and did actually say, that the termor is seised of the land as of his term, while his lessor is seised of the land as of freehold. There was no great need for the decision of an almost metaphysical question. During the thirteenth and fourteenth centuries the termor played but a very insignificant part in English law. Gradually, however, he forced himself upon the notice of the courts, and acquired one remedy after another for the protection of his term. It became necessary to fix his position. What could be said of him? It was quite impossible to regard him any longer as one who holds possession on behalf of another; on the other hand, it was important to mark the fact that his remedies were very different from the old possessory remedies of the freeholder. He had never had, he never acquired, the assize of novel disseisin, though we may note by the way that the author of the 'Mirror,' in several passages, declared that it is an abuse of the law to deny this assize to the termor and to the tenant in villenage<sup>1</sup>. A word to describe the termor's situation was wanted, and *possession* (a term comparatively free of technical implications) lay vacant and unappropriated. The termor, then, is possessed, not seised.

It is rather the verbal solution of the difficulty than the difficulty itself that is peculiar to England. In the yet unromanized law of mediaeval Germany *Gewere* (a word which we can only translate by *seisin*) plays, as I understand, very much the same part that *seisin* plays in England and in France; not quite so important a part, because Henry the Second's institution of definitely possessory remedies gave to possession a peculiar prominence in English and in Norman law, but still an important part. Now those who have of late studied the vast stores of old German law say that the German notion of *Gewere* differs from the Roman notion of *possessio* in this, that at one and the same time lord and tenant, or lord, mesne and tenant may have possession. The cultivator who is sitting on the land is seised of the land, but the lord also to whom he pays rent

<sup>1</sup> Abuses of the Common Law, 72, 76, and again in the Articles on Stat. Westm. 2.

in money or kind is seised of the land. In a dispute between tenant and lord seisin and its procedural advantages are with the former, but in relation to outsiders each is seised. As Bracton says, *istae duae possessiones sese compatiuntur in una re*. It would indeed have been hard to force the wonderfully variegated phenomena of mediaeval land tenures into the pigeon-holes of a theory which will ascribe possession to but one person at a time, and say of all others, Non possident. And this, it is said, is what obscures the discussion of the Roman *possessio* by commentators and glossators, by Azo, for example. With the facts of their own time before them they could not hold the faith unitarian and Roman of one *dominium* and one *possessio*; the lord has *dominium directum*, the vassal *dominium utile*, the lord possesses *civiliter*, the vassal possesses *naturaliter*, but none the less possesses for himself, and not for the lord: hence some wonderful confusions which Savigny had to clear away. We in England were fortunate in finding a second word at our disposal; so the termor is possessed and the freeholder is seised<sup>1</sup>.

From this it would be no long step to the assertion that there is no seisin of chattels, neither of chattels real nor of chattels personal. For why is not the termor seised? The ready answer would be because he has but a chattel. The origin of this strange saying 'a term of years is a chattel' is not very certain, but seemingly it meant that the term could be bequeathed; for testamentary purposes it was *quasi catallum*. Bracton says (fol. 407b) that the ecclesiastical court is not to be prohibited from entertaining a suit touching the bequest of a term, *quia ususfructus inter catalla commutatur*. It was *catallum* as contrasted with that *laicum feodum* with which no Court Christian may meddle. The necessity for this fiction would in course of time be forgotten. The obvious facts would be that the termor is not seised and that the termor has a chattel; an inference would lie ready to hand. The time had long gone by when it could truly be said of the termor that he held *nomine alieno*, leases for years were becoming common and valuable, and it was easier to lay down as one of the final inexplicabilities of the law that of chattels, whether real or personal, there is no seisin, than to rake up an old story. It may seem a far-fetched doctrine that the reason why we cannot now be seised of a horse, or of a book, is because there was a time when the tenant of land for term of years had only a contractual right, but far-fetched though it be, it is fetched from England, not from Lombardy.

However, what has just been said is no better than guesswork,

<sup>1</sup> Laband, *Die Vermögensrechtliche Klagen*, especially pp. 158-166; Henster, *Die Gewere*, especially pp. 114-144, 299-304; and a brief account by Brunner in *Von Holtzendorff, Encyclopaedie, Erster Theil* (4<sup>te</sup> Aufl.), p. 248.

and is only submitted as such to the reader, who will easily discriminate what is stated as fact from inferences and conjectures. But he will notice that such evidence as has been produced tends to prove that the distinction between seisin and possession became a settled distinction just about the time when the termor's remedies against all men were finally perfected. The early history of the special writ of trespass known as *Ejectione firmæ* is still in some respects obscure. It became the termor's remedy against a stranger to the title who ejected him. Now, at the very end of the fourteenth century, it seems perfectly settled that this writ (unlike the *Quare ejecit* which will lie against a purchaser from his lessor) will only give him damages, and will not restore him to the land<sup>1</sup>. On the other hand, about the middle of the fifteenth century lawyers certainly speak as though possession might be recovered by this writ<sup>2</sup>. It is usual to refer to a decision in Henry the Seventh's reign as having finally settled the question in favour of restitution. May we not, therefore, conjecture that the daily increasing necessity of distinguishing the title to bring *Ejectione firmæ* from the title to bring an assize, forced upon the courts the verbal distinction between possession and seisin?

And when the middle ages are past and over, and Coke is summing up their learning, though he has many surprising things to tell us about the consequences of seisin, he can tell us no more about its meaning than that it is possession, but appropriated to freeholds. These are his sayings:—

*Seisin* or *seison* is common as well to the English as to the French, and signifies in the common law possession, whereof *seisina* a Latin word is made, and *seisire* a verb (Co. Lit. 153a).

*Seisin* is a word of art, and in pleading is only applied to a freehold at least, as *possessed*, for distinction sake, is to a chattel real or personal (200 b).

*Seised*, *seisitus*, cometh of the French word *seisin*, i. e. *possessio*, saving that, in the common law, *seised* or *seisin* is properly applied to freehold, and *possessed* or *possession* properly to goods and chattels; although *sometime the one is used instead of the other* (17 a).

Nothing about investiture or admission of a tenant into the tenure, nothing feudal, simply possession, 'i. e. *possessio*.' The distinction has no mysterious basis in the eternal fitness of things; it is a distinction which exists 'for distinction sake.' And, after all, of these two words, 'sometime the one is used instead of the other.' Probably this last phrase does not so much refer to the usage of

<sup>1</sup> Pasch., 6 Ric. II (Fitz. Abr. tit. *Ejectione firmæ*, pl. 2). We are still dependent on Fitzherbert's extracts for cases from this important reign.

<sup>2</sup> Pasch., 7 Edw. IV, fol. 6, pl. 16; Mich., 21 Edw. IV, fol. 11, pl. 2.



Coke's own day (for the interpretation set upon several important Statutes, in particular the Statutes of Forcible Entry and the Statute of Uses, had by that time made it definitely incorrect for one to write of a termor as seised), as to the usage of an earlier day well known to Coke from his old books. Probably, he would indeed have thought scorn of the meagre list of examples which has been set forth above. In his day it was still too soon for an English Chief Justice to be severely and intelligently feudal. In course of time it became easier to read the *Libri Feudorum* than to read the Year Books, and 'the total silence of Sir Edward Coke on the general doctrine of fiefs' became 'a matter of some surprise.' Therefore, seisin shall be deemed a 'technical term to denote the completion of that investiture by which the tenant was admitted into the tenure.'

We have been dealing, perhaps, too much with words, too little with rules; but a recognition of the fact that the lawyers of the thirteenth, and even of the fourteenth century, saw no harm in pleading about the seisin of chattels is of some importance, if the history of seisin, 'i. e. possessio,' is to be understood. It, at least, warns us away from an untrue explanation of that history. However strange may be the legal consequences which we find annexed to the seisin of land, they are not the result of a military policy, or anything of the sort, they are what were once considered the natural consequences of possession; and there is good reason for believing that, if we look closely enough at our comparatively few and scattered authorities for the early history of personal property, we shall find very much the same consequences annexed to the seisin of chattels.

It is very unfortunate that the passage (f. 220 b) in which Bracton most definitely faces the question as to the nature of the termor's possession has become mere nonsense in the printed books. He is speaking of freeholder and termor and of the action *Quare ejecit*. This is what his latest editor makes him say; but the bracket [ ] is mine.

Poterit enim quilibet illorum sine praejudicio alterius, [quia rectè dicimus totū nostrum fundum esse, et cum usus fructus alienus sit, quia nō domini pars est usufructus, sed servitus fit vel via etc.<sup>1</sup> Nec falsò dicitur meum esse, cujus non potest pars dici<sup>2</sup> alterius esse] in seysina, esse ejusdem tenementi, unus ut de termino et alius ut de feodo et libero tenemento<sup>3</sup>. Et datur ista actio haeredibus et competit contra haeredes ut supra in assisa novae disseisinae.

<sup>1</sup> 'servitutis fit, ut via vel iter,' MS. Rowl. C. 160.

<sup>2</sup> 'ulla pars dici,' id.

<sup>3</sup> 'et ejusdem tenementi unus ut de termino, et alius ut de feodo vel libero tenemento,' MS. Rowl. C. 160.

This of course is utter rubbish, and the translation of it given by Sir T. Twiss is neither better nor worse. I think it fairly certain that the bit of romanesque reasoning which I have placed within brackets is one of those marginal notes or glosses which, as Prof. Vinogradoff showed in the last number of this Review, have forced their way into the text. I have looked at twenty-one MSS. Six were indecisive, either because the whole passage had been abridged, or because it was missing or displaced. Five supported the printed text. Two others had done so when first written, but an attempt had been made to set the matter straight. Five give the bracketed passage after the words 'et libero tenemento.' Three and the printed Fleta give it after 'in assisa novae disseisinae.' Both of these last-mentioned arrangements make sense and the former makes good sense, but when there is so much doubt as to the place in the text at which some forty words should be introduced, the most natural inference is that they should not be in the text at all. Probably we ought to read the passage thus:—

*Text.*

Poterit enim quilibet illorum sine preiudicio alterius in seisina esse eiusdem tenementi, unus ut de termino et alius ut de feodo vel libero tenemento. Et datur ista actio heredibus et competit contra heredes ut supra in assisa nove disseisine.

*Note.*

Quia recte dicimus totum fundum nostrum esse et cum usufructus alienus sit, quia non dominii pars est usufructus sed servitus sicut via vel iter, nec falso dicitur meum esse cuius non potest ulla pars dici alterius esse.

What I take to be the gloss is not quite in harmony with the text. The text says boldly that each is in seisin of the tenement; the note suggests that the termor has only a servitude and no seisin of land. To harmonize English and Roman ideas was no easy task.

F. W. MAITLAND.

## JUSTICE IN EGYPT.

THE title of this paper will, to many minds, suggest a problem of a very difficult if not insoluble character. It certainly conjures up a train, ghostly as the procession of kings in *Macbeth*, of successive commissions, enquiries, and reforms, alike in tedious length of preparation and in swiftness of failure. The seed has often been good, but its invariable fate has been that of the seed which fell upon a rock. It is our object to state shortly our reasons for holding that this uniform result has likewise a uniform cause, which must be removed if Egypt is to have a chance of true growth and development.

This cause may be indicated at once. It is this. The influence of France has, in legal as in political questions, been solely directed to the preservation of the exceptional position which she is to the present hour permitted to occupy in Egypt. Her claims to represent civilization abroad have, in the face of the glaring facts of her daily life at home, been allowed to prevail. Her governmental institutions and subdivisions, her offices, titles, and nomenclature, have been imported wholesale into Egypt. Her narrow and arbitrary principles of administration, which have survived all her domestic revolutions, because they merely reflect her national character, are tolerated or enforced in Egypt by the European representatives of freer and more large-minded systems. The long-continued presence of an English army has done little or nothing towards breaking the stiff French moulds in which all the modernized institutions of Egypt are cast. It would puzzle even a Frenchman to give a satisfactory account of the 'enormous interests' which Europe has, for its own reasons, agreed to consider as appertaining to his country in Egypt. In his serious moments the real facts are plain enough to his mind. He knows that Bonaparte's expedition, which forms the root of the title claimed by France, was in due form of the laws of war 'ejected' by Englishmen. He knows that the ejectment was completed amidst the plaudits of every Arab in the country. He knows, further, that the French colony in Egypt has, since its foundation, provided an Alsatia for every *mauvais sujet* who could escape from Marseilles to Alexandria. Broken officers, financiers who have received criminal punishment, and disbarred lawyers have flocked to the land of the Pharaohs. They have there started patriotism as a business, to the immense annoyance of their respectable compatriots, but to the

great satisfaction of the ambitious occupants of the French Consulate at Cairo.

Nor is our thoughtful Frenchman less alive to the true position of the Suez Canal question. He is perfectly aware that, but for the receipts from English shipping, the Canal Company would have utterly ruined its originators and shareholders. His sense of humour, however well suppressed, is alive to the fact that it is by her own consent that England occupies a back seat in the councils of an enterprise which she could destroy financially to-morrow. If he turns to the military importance of the Canal, his mirth gives place to a solid satisfaction. His country is allowed to pose as the natural guardian of a passage which is to England as necessary as the Straits of Dover. The French ships which traverse that passage have no occupation on the far side, beyond visiting the melancholy bureaucrats who twiddle their thumbs in Republican 'colonies,' or fitfully bombarding Chinese and Malagasy towns filled with English subjects and English property. Yet, French diplomacy, holding now the language of 'European interests' and now that of 'civilization,' succeeds in dictating the conditions under which English ships are permitted to carry the trade of the world and to connect the mother country with her kindred millions beyond sea. Our Frenchman would be hardly human, were he to withhold his support from national claims which, though utterly baseless, have, by a wonderful stroke of luck, been held good and bring vast profit in their train.

It has been absolutely necessary to allude to the political position of France in Egypt, because with that position her claim to mould and colour the legal institutions of the country must stand or fall. There is, unhappily, no branch of French intermeddling which has had more disastrous results. French law, like the French national character, is utterly unsuited to Eastern populations, unless the latter are to be reduced to systematic subjection and to be deprived of the most ordinary fairness of treatment. This evil is aggravated in Egypt by the mixed character of the population and by the system of consular 'protection' of particular natives whose views or money have found favour with one or other of the representatives of Europe.

We have, in other places<sup>1</sup>, traced the history of the gradual establishment of European law in Egypt. In this paper we can only summarize the chief events in that history. They may be conveniently assigned to three stages.

The old Capitulations or Treaties between the Porte and the

<sup>1</sup> 'The Future of Justice in Egypt.' London: P. S. King & Co. 1881. 'France and Judicial Reform in Egypt,' 'National Review,' March 1883.

European Powers, which still form the basis of the legal rights of Europeans in the Ottoman Empire, were concluded at various periods between the reign of Francis I. of France and the present day. Their original *raison d'être* was the impossibility of obtaining justice for Europeans in the venal and arbitrary tribunals of the Sultan. As the Turkish power declined, the legal rights claimed for Europeans gained a wider and wider extension. The earlier Capitulations acknowledged the supremacy of Turkish law, but secured to Europeans the decision of their litigation with natives before the Supreme Court of the Empire. They further stipulated for the presence in court of the consul of the European parties, and for the assistance of competent interpreters. In course of time the growing influence of Europe and the multiplication of commercial relations between Europeans and Turkish subjects rendered the want of a strong and honest judicial establishment more intolerable than ever. In some quarters, as in Tunis, the lawless ill-treatment and plunder of Europeans had to be punished by bombardment. Admiral Blake's expedition in 1655 put an end to Turkish jurisdiction over Englishmen in Tunis, and secured to them justice administered by Englishmen on English principles. It was reserved for Lord Granville in 1884 to destroy rights which had lasted for more than two centuries, and to hand over his countrymen to courts controlled by the French Government. The native subjects of the Porte were in still worse case. They were often prevented from fulfilling their due engagements with Europeans because they had been beggared by corrupt decisions of the native Courts or by the fiscal rapacity of their Government. A first attempt to meet the difficulty in Egypt was made by the institution of Consular Courts for the decision of matters arising between Europeans or between Europeans and natives. Each Consul was judge in his own court, and employed, for the execution of his judgments, all the personal and diplomatic pressure which he could command. Purely commercial cases were in course of time provided for by the erection of Tribunals or Chambers of Commerce at Cairo and Alexandria. These Tribunals had a mixed Bench of native and European judges and technical assessors, and applied the French Code of Commerce. Up to the year 1876 there were in Egypt seventeen Consular Courts, each administering the law and referring appeals to the Courts of its country of origin. The intolerable delays, and the facilities for trickery which resulted, as of course, from this motley system, need little comment. In course of time the power of the Consular Courts advanced to such a pitch as to paralyse the Government of Egypt. The Egyptian police could not arrest the most notorious criminals if the latter were Europeans, or natives who had enrolled themselves

as *protégés* of a European Consulate. Impunity, especially in the case of a rich culprit, became a reasonable certainty. Sham claims against the Egyptian Government were enforced by Consular pressure and yielded a rich harvest to their authors. Ismail's desire to stand well with Europe at all costs was here reinforced by the consciousness of his ability to recoup himself by extra taxation of his subjects for the exactions of 'European' impostors. Indeed the worst feature of the Consular omnipotence was the bold relief in which it placed the helplessness of the native population. Ismail Pasha, the humble servant of any European Consul, remained the absolute master of every Arab who was without consular protection. The judges of the native Courts were one and all under his thumb. The native litigation, pure and simple, was beyond the cognizance of the Consular or Commercial Tribunals. Native litigants, in consequence, adopted every imaginable expedient to secure the decision of their cases by European judges. Actions were brought in the borrowed names of Europeans who were paid handsomely for the loan. Every description of transfer, assignment, and compromise was made with the same object. For the great mass of the population these methods of evasion were too costly, and they remained subject in civil matters to the *Mehkemeh* or Court of the Cadi, in criminal matters to the Mudir or Governor of their province. Such were the main features of the second or Consular stage of Egyptian justice. At its commencement the European powers merely took measures to withdraw their subjects from the corrupt and tyrannical jurisdiction of the Turkish authorities. Towards its close these powers had identified themselves with another system of corruption and tyranny, exercised to their own advantage, but to the grave detriment of the natives whom they still professed to wish to raise and civilize.

The third or international stage of Egyptian justice had an almost purely political origin. It was the outcome of Ismail Pasha's attempt to cast off the suzerainty of Turkey after the Candian revolt in 1866. His direct demand for concessions which involved the autonomy of Egypt were rejected by the Porte, and would, a very few years earlier, have been punished by death or deposition. But Ismail's safety was secured by his European reputation for liberal ideas, and his adoption of the sagacious counsels of his Armenian minister Nubar Pasha. This statesman had long been of opinion that Ismail's absolute despotism over his native subjects and his helpless enslavement by the Consular Courts were working together for the ruin of Egypt. He accordingly advised his prince to drop the phrase of 'autonomy' and to request the Porte's authorization for negotiations with the Powers on the subject of the Capitulations. That intolerable

usurpations of authority had been made under the existing system was almost generally admitted by those Powers. The negotiations proposed were to bear on the establishment in Egypt of a judicial system having authority over natives and Europeans alike. The Courts exercising this authority were to have a mixed Bench, after the pattern of the existing Commercial Tribunals. They were to be wholly independent of Government fear or favour, and their jurisdiction was to extend to actions by and against Ismail Pasha himself. Europe would not fail—Nubar added—to look favourably on the first attempt of a Mohammedan ruler to introduce the principles and practice of European justice for the benefit of every inhabitant of his territory. The presence of European judges on the new Egyptian Bench would render superfluous the existing Consular jurisdiction. In the event, Ismail might hope to attain a degree of practical independence far exceeding any nominal concessions to be wrung from the unwilling Porte.

Nubar Pasha and his master probably expected very different results from the scheme thus propounded for adoption. The Viceroy hoped to escape Consular dictation in the future, and to work round to his own ends—whatever its nominal restrictions of his power—the first distinctive institution which Egypt was to possess. Nubar, equally alive to the real drawbacks of Consular interference, was mainly concerned to secure a new and efficient check upon the Viceroy's tyranny—a check of which that prince, with all his astuteness, could form no adequate conception. The natives once protected by independent Europeanized tribunals, they would gradually derive the full benefits of commercial and general relations with Europe.

Of the negotiations to which the Viceroy now authorized Nubar to obtain the Porte's consent we can only give a short sketch. Nubar was met at first with a rejection of his whole scheme, but the good offices of the chief European Ambassadors at Constantinople and a liberal use of money ensured its partial acceptance in May 1867. For himself the Viceroy obtained the hereditary title of Khedive, and for Egypt a general permission to negotiate with Europe on the subject of the Capitulations.

Nubar was perfectly aware from what quarter of Europe to expect resistance to his proposals. France had been the main champion of the *imperium in imperio* principle. It had long been impossible to secure the punishment of a Frenchman, even though regularly sentenced by his own Consular authorities. The French Consuls had come to consider themselves as Residents in a semi-French dependency. Only a few years earlier the French colony

had claimed to be represented by a Deputy in the legislature of France.

Nubar's expectations were fully justified by the event. In a lengthy memorandum issued to the Powers he gave a detailed description of the ruin which their Consuls and Consular *protégés* were bringing upon Egypt. He subjoined a first sketch of the new law and judicature on the lines of that already submitted to the Khedive, and prayed for its favourable consideration.

England was the first Power to admit<sup>1</sup> that the Consular jurisdiction had exceeded all reasonable limits and to assent to the principle of an International Commission of Enquiry. All the other Powers except France followed suit; Turkey, however, reserving her right of ratification. France refused to entertain the idea of a supersession of her Consular jurisdiction, but was, after two years of wrangling, induced to join the Commission of Enquiry at Cairo. It is not improbable that the passage in Nubar's memorandum which proposed that the European element in the new law of Egypt should be drawn from the French Codes had its due effect on the decision of France. The Commission amended the scheme contained in Nubar's memorandum by assuring the preponderance of the European judges, but fully maintained the principle of including the natives of Egypt in the new jurisdiction. The Porte, however, to whom the Commission reported in 1870, utterly refused to part with its control over the native litigation. The one provision, therefore, which was of the first importance to Egypt, if not to Europe, was allowed to drop as the price of the ratification of the others.

The date of the Porte's formal consent in April 1870 was separated from that of the actual commencement of work by the International Tribunals in February 1876 by a throng of historic events. French preponderance in Egypt, which seemed to be secured by the opening of the Suez Canal, was gravely affected by the triumph of Germany in the war of 1870-1871. Warlike rumours in other directions abated the interest of Europe in the judicial reorganization of Egypt. There was a tacit agreement to wait for quieter times. But with the revived energy of France in military and financial matters returned her antipathy to parting with a jot of her Consular authority in Egypt. Speakers and publicists began to thunder against Nubar's scheme as an additional humiliation which hostile Germany and perfidious England were endeavouring to thrust upon France. The old claims of that country to deal with Egypt as with *casa sua* were revived and carried to unprecedented lengths. But in 1875 the European

<sup>1</sup> In a despatch from Lord Stanley to Colonel Stanton. October 18, 1867.



Powers saw no reason for yielding everything to a rival nation which had recently cut so sorry a military figure. Nubar finally secured the adhesion of France to the new order of things by arguments best summed up in the phrase 'c'est à prendre, ou à laisser.'

We have, so far, given no detailed description of the new Judicature of Egypt. So numerous were the modifications in principle and in detail which were introduced between 1867 and 1876 that even a short account of them would weary our readers. As finally constituted the judicial establishment was as follows:—A Court of Appeal was placed at Cairo. Three Courts of First Instance were assigned to Cairo, Alexandria, and Ismailiyeh. The Bench of each Court contained both native and European Judges, the latter having a standing majority and always furnishing the President of the Court. Each of the European Powers was represented by a Judge or Judges nominated by itself and formally appointed by the Khedive for a fixed period of five years. The native Judges were mere nominees of the Khedive. These Courts and Judges were flanked with a large array of subsidiary offices and institutions, one and all copied from originals in France. Everything seemed to have been done to give a French practitioner advantages over his compeers of other nationalities. Here he found *greffiers*, *commis-greffiers*, and *huissiers* whom the *Règlement d'organisation Judiciaire* ordered to be chosen 'from amongst the corresponding officials in Europe.' Here he found a heterogeneous mass of *avocats* and legal agents of the most nondescript character treated as a regular profession and marshalled *à la française* under *Bâtonniers*. Here he found a *Parquet*, or establishment of law officers, headed by a *Procureur Général*. In a hundred other small details he found materials for assuring to himself a position from which he could defy competition—English, German, Italian, or Egyptian. The code of law moreover which was put into his hand was the law of France. Nubar's constant failures in getting the Powers to work together, even on questions of principle, had probably made him despair of getting them to elaborate an original code for Egypt. Accordingly he had handed the Code Napoléon to M. Mannoury, a very eminent French lawyer, and had directed him to construct an abridgment for use in Egypt, and to introduce a few principles of Arab law mainly bearing on the law of real property. For reasons with which we are unacquainted the work was completed in a very hasty manner, and its provisions on many points are little more than fragmentary.

The question may fairly be asked whether France could have been genuinely opposed to the introduction of a system which

promised such peculiar advantages to Frenchmen. The fact of her resistance is however undoubted, and both it and her final acquiescence may be accounted for as follows. Her one object was to retain a firm footing in Egypt. Her Consular jurisdiction had enabled her to do this to perfection, and she saw no ground for alteration. When however she saw the new institutions assuming a shape which, nominally international, was intrinsically French, her resistance was prolonged for the purpose of gaining every possible further concession.

The first quinquennial period of probation for which the International Tribunals were instituted expired in February, 1881. During the five years in question, the new Tribunals, the Consular Courts, and the native Courts were working side by side in Egypt. With the two latter jurisdictions we are not now concerned. The work done by the mixed Tribunals has been subjected to an exhaustive criticism by M. Van Bemmelen, who represented Holland on the International Bench from 1876 to 1880. To his most valuable work<sup>1</sup>, which forms the first authority on our subject, we must refer all those whose patience with us has lasted thus far. He describes, with the vividness of an eye-witness, the strong and the weak points of Nubar's reforms. The cumbrous as well as exotic organization of the Courts and legal offices ensured the bewilderment of native litigants and gave enormous advantages to European pettifoggers. The Codes, drafted in French, and translated into the two other judicial languages, Arabic and Italian, were never employed except in the French original, whatever the nationality of the Judges or parties. Legal documents of every description were filled with technical jargon which only a French lawyer could understand. The expedients for delay and adjournment, in which French procedure is so fertile, were permitted to an extent which made a compromise almost a matter of course. Judgments by default were given on the slenderest evidence, and the office clerks inserted in the drafts of such judgments an unauthorized statement to the effect that the defendant's non-appearance furnished a presumption against him. The Judges, many of them honest and able men, were overwhelmed with disciplinary and administrative duties, and were exposed to the most savage personal attacks from the European mercantile community. The practitioners in the Courts, of whom many were little more than money-lenders, mixed up legal, political, and financial business in the most scandalous manner. The mixed Tribunals had gradually become agencies for the advantage of foreign stockjobbers and native usurers. Their jurisdiction over the Government and

<sup>1</sup> 'L'Égypte et l'Europe. Par un Ancien Juge Mixte.' Leiden : E. J. Brill. 1881.

private property of the Khedive, originally proposed as a protection for his native subjects, had become an unfailing though indirect means for the imposition of new taxes. Finally, the native element of the mixed Bench knew nothing of French law, though some of them knew a little of the French language. 'If you consider,' writes M. van Bemmelen (p. 211), 'the utter inability of English or American lawyers to understand French law, and that of French lawyers to make anything of English law, unless after long study, you can feel no surprise that the Egyptian Codes remain sealed books to the native Judges. These Codes, like the French Codes, are as it were a collection of scattered and half-pronounced words, which suffice for people with good ears, that is to say for Frenchmen who have served their apprenticeship to their Codes, with the learning and jurisprudence thereto appertaining, and to the still more important knowledge and ways of legal practice. Unfortunately, as regards French law the native Judges have not good ears, and "words to the wise" have no meaning to them.' Under these circumstances the natives were little more than witnesses of the proceedings of their European colleagues.

Dissatisfaction with the working of the International Tribunals had become general both in Egypt and in Europe, though the reasons for that dissatisfaction varied in almost every case. Champions of the natives held that the limited jurisdiction of the Tribunals constituted their chief drawback, especially as they furnished so powerful an instrument for affecting the welfare of those who had no right of being heard. The ultra-European view was in favour of arming the Tribunals with any powers which they might lack towards the completion of their control over every branch of Egyptian authority. France, as usual, took a middle course. The most remarkable expression of her opinions is to be found in an article contributed to the '*Revue des Deux Mondes*' by M. Gabriel Charmes in November, 1880. His chief quarrel with the Tribunals was on the score of their independence of Government pressure—a view natural to the son of a country in which a fierce crusade was being carried on, at the time, in favour of supplanting the existing irremovable Judges by political nominees of the Republican Government. The President of the Egyptian Court of Appeal was, in 1880, M. Lapenna, an Austrian judge of iron integrity, who was, from the very first, honoured with the hatred of Frenchmen in Egypt. No political or commercial jobs had found any favour in his eyes. A deep study of the unsavoury components of the European society in Egypt had eventually brought him into collision with the underground intrigues in which he found Greeks, Levantines, and Frenchmen incessantly engaged. Some of his own

colleagues had shown a less Spartan front to the constant alternation of solicitations and backbitings with which they were plied. This attitude of M. Lapenna fully accounts for M. Charmes' insistence that he and his successors must be placed in a position of dependence on a Government which France had abundant means of coercing. But M. Charmes takes higher, i. e. more French, ground. His article is in part a denunciation of the want of enterprise shown by the French Government at the period at which it adhered to the principle of the new International jurisdiction. His views as to the just claims of France in general, and to the political duties which an honourable French Judge might be fairly expected to discharge, are most instructive: 'Puisqu'il n'était plus possible, à l'aveu de tout le monde, de maintenir en Égypte la juridiction consulaire, il aurait fallu accepter résolûment, franchement la nécessité, se placer à la tête du mouvement de réorganisation judiciaire, comme on s'était placé jadis à la tête du mouvement des capitulations, et tâcher, par un initiative hardie et généreuse, de faire tourner *au profit de notre influence* une révolution que nous ne pouvions point empêcher. Après tout, l'unité de juridiction qu'on allait substituer à la multiplicité des lois et des tribunaux consulaires *n'était pas sans avantages pour nous*, puisque la magistrature nouvelle qu'il s'agissait d'organiser devait appliquer nos codes, parler notre langue, suivre notre jurisprudence. Quelle force n'aurions-nous pas acquise en Égypte *si nous nous étions moralement emparés de cette magistrature*? L'entreprise n'offrait aucune difficulté. Pour y réussir complètement, il aurait suffi de nous décider vite à accepter la réforme judiciaire, et, cette réforme acceptée, d'envoyer en Égypte *comme défenseurs de nos intérêts*, des magistrats jeunes, intelligents, actifs, qui y auraient pris tout de suite une position à part, puisqu'ils y auraient connu mieux que personne une législation calquée sur la nôtre, des codes imités des nôtres, des principes de droit et de justice qu'on était venu chercher dans notre pays<sup>1</sup>.

The result of the delay of France to sanction a reform which England, the German Powers, and Italy had already accepted, is described by M. Charmes in these melancholy terms<sup>2</sup>: 'Des hommes étrangers à nos lois et à nos pratiques d'administration judiciaire, occupaient *les positions que nous aurions dû prendre à tout prix*. . . . Pendant que les autres puissances s'empressaient d'occuper le terrain judiciaire où allaient se livrer toutes les luttes futures pour la prépondérance en Égypte, la France s'occupait à se retracer à elle-même les souvenirs glorieux de l'époque lointaine où elle obtenait, au moyen de capitulations, une influence sans rivale en Orient, et où tout le monde était obligé de se couvrir de son pavillon pour faire le commerce dans le Levant.'

<sup>1</sup> 'Revue des Deux Mondes,' November 15, 1880, p. 279 sq.

<sup>2</sup> Ibid. p. 280.

Finally, M. Charmes asks<sup>1</sup>, 'Croit-on que tous les magistrats envoyés en Égypte ont été immédiatement rayés des cadres de notre magistrature, et prévenus qu'ils n'y auraient plus d'avenir? *N'était-ce pas se condamner à n'exercer aucune action sur eux?*' The rest of the article is taken up with proposals for destroying the independence of the International Tribunals. The *Parquet* of Egyptian law-officers was to be enormously strengthened and a *Conseil d'état*, a *Tribunal des Conflits*, and a *Cour de Cassation* were to complete the legal panoply of the State. The 'State' in question being at the time in the leading-strings of the Dual Control, would of course have been infinitely more amenable to 'permeation' by France than an independent Court which retained feelings of public duty or personal honour.

An International Committee of Judicial Reform met at Cairo in 1880, and considered suggestions of the discordant character to which we have alluded. Amongst other schemes they debated, and rejected, a plan of reorganization submitted by the Government of Riaz Pasha. Nubar's banishment from Egypt at the time had permitted the French element to gain head, and the Government had been induced to father suggestions almost identical with those made by M. Gabriel Charmes. Every alteration or modification therein contained bore a French character. Native Judges were to be appointed in much larger numbers, and the new edifice of law was to be crowned by a *Cour des Conflits* composed of native Judges and a native Minister of Justice, each to be nominated and dismissed by the Egyptian Government. On this project we commented as follows in March 1883: 'The introduction of a controlling administrative element would place judicial independence in Egypt at the mercy of the Government. Thus, the European Power which has for the time most influence with the Egyptian Ministry may, through them, control the Courts of law. Nothing but the independence of the Tribunals in the days of the Dual Control prevented France from holding this position<sup>2</sup>.'

When Europe is sufficiently unanimous as to what is to be done with Egypt, the sittings of the Judicial Reform Committee will probably be resumed. But the French difficulty will meet them again on the threshold of their labours. The extension to the whole population of the country of that French law which now bears hardly even upon non-French Europeans would be, not only iniquitous but, in the long run, impracticable. But as almost any settlement of Egyptian affairs which can at present be contemplated must be characterized by the transfer to France of England's position on the Nile, the course which we have

<sup>1</sup> 'Revue des Deux Mondes,' *ibid.* p. 284.    <sup>2</sup> 'National Review,' March 1883, p. 122.

styled iniquitous and impracticable will not improbably be adopted, however certain its ultimate failure. It is with mixed feelings of contempt for his own country and for 'civilized' Europe and of pity for the poor Arab *justiciables* of the harsh and crabbed law of France that those Englishmen, who belong to no political party, will look on. Were the political stumbling-blocks removed, it would be easy enough to sketch out a legal system which should further the real interest of the whole population of Egypt. We have our own Anglo-Indian Codes as examples of what may be done for an inferior race by a superior, which establishes equality before the law as the first step on the path which will eventually lead to something like equality in civilization. In Egypt the exemption of foreigners from taxation and the paramount claims of the foreign bondholders have probably had their day. Eventually the last vestiges of differential *rights* must disappear. In this case every argument for the maintenance of a purely exotic system of law will also disappear. The primitive life and occupations of the bulk of the inhabitants of Egypt may be regulated by judicial machinery much simpler than that of the French Codes. No exclusively French enactments should be retained, and every suitable prescription of Mohammedan law should be utilised as far as possible. Europeans must of course, for years to come, superintend and control the administration of any system of justice to be established in Egypt. But the new Tribunals should be *national* as far as possible, not administrative departments on the French, but independent organizations on the English plan. At Cairo there should be a Court of Appeal having appellate jurisdiction from all inferior Courts, and, also, complete original jurisdiction for the purpose of rehearing any case. The capital town of every province should have a Provincial Court of First Instance, and should exercise the jurisdiction now possessed (1) by the International Tribunals of First Instance, (2) by the chief *Cadi* in the *Mehkemeh*, and (3) in fiscal and criminal cases by the *Mudir* and *Mamur* of each province. Religious and ceremonial questions affecting Mohammedans should be decided by the native Judges of the Provincial and Appeal Courts respectively, sitting as a native Chamber in each case. To each Provincial Court should be attached standing Counsel, of approved character, specially charged to conduct or watch all actions between the *fellahin* and the village usurers, for the purpose of assisting the legal ignorance of the former, which is almost complete. The third and last rank in the judicial hierarchy should be occupied by District or Police Courts, for the decision of petty cases of all kinds. These Courts should take over the

present jurisdiction of the inferior *Cadis* and the *Sheikhs-el-beled* or village headmen. A single Judge should sit in each District Court, and should, in the majority of cases, be a European. In the superior Courts the European Judges should retain their standing majority, but every effort should be made to train up an efficient staff of native Judges. The cost of so many European Judges, if good men are to be invited and retained, will of course be heavy; but at the day in which we may hope to see the plan realized, we shall probably have to deal with an Egypt which no longer sends three-fifths of its annual budget to creditors in London, Paris, and Berlin.

Much may be done towards familiarizing the *fellakin* with the new jurisdiction and for their general protection, by prescribing the forms in which the most usual operations of law are carried out. The Franco-Egyptian legal documents now in vogue are composed, like their prototypes in France, after the manner of works of imagination. The French draftsman of a lease, contract, or deed of settlement takes an intellectual but inconvenient pride in referring to the same matter in the same document by twenty different names or descriptions. This procedure, exasperating as it is to the non-French European, is legal death to the Arab. In the larger and better times for which we hope, short printed forms should be framed in Arabic and one European language of (1) Contracts of Sale or Lease, (2) Mortgages, (3) Bills of Sale. Under the present régime the Arab *Sened*, which is a mere memorandum of personal debt, is often doctored by European creditors into the shape of a Bill payable to order, without the knowledge of the Arab debtor. Supplies of the new forms should be issued by authority to the offices of each Court and sold at a fixed price. Any document purporting to come under one or other of the preceding heads, but substantially differing from the form prescribed, should be treated as void in law. Lastly, the legal practitioners and the clerical staff of the Courts should undergo a thorough reform with regard to their qualifications, admission, discipline, and dismissal.

Few men who are acquainted with the subject would deny that these are the leading features of any judicial reform to be undertaken in the general interests of Egypt. That the sketch is, under existing circumstances, of academic if of any interest, we are ourselves painfully aware. But we shall be satisfied if we have convinced even one unthinking partisan of the 'civilizing mission' of France that to tighten her legal grasp on Egypt would be to inflict a new plague on that unhappy country.

HAROLD A. PERRY.

### THE NEW FRENCH DIVORCE ACT.

**T**HE history of divorce in France is short and simple. Repudiated by the Roman Catholic Church, it was not legally recognised under the Old Monarchy; and it was the legislators of the Revolution, hostile to any clerical interference in civil government, who first introduced divorce into French law. The new theory was that marriage was to take its place in civil law as a contract dependent like other contracts on the consent of the parties, and as such revocable by consent. The law of 1792 in its enumeration of the other grounds of divorce comprised insanity, desertion, absence, emigration, and incompatibility of temper on the allegation of either party. Like other civil contracts it could furthermore be rescinded without judicial intervention, though not without certain private formalities to be performed within the family. Even these formalities were almost all removed by two subsequent decrees, but these were soon repealed, and the law of 1792 remained alone in force until the framers of the Civil Code remodelled and systematised the law of divorce with the moderation that characterised their work. They sought by a middle course to avoid thwarting the convictions either of the votaries of extreme freedom or of the votaries of indissolubility of marriage. Thus, on the one hand they allowed mutual consent to stand as a ground of divorce to satisfy the former, but they surrounded its operation with stringent conditions and safeguards to satisfy the latter. They also revived judicial separation for those who objected to divorce on religious grounds.

On the restoration of the Bourbons Roman Catholicism again became the national religion<sup>1</sup>, and one of the first changes made by the new rulers of France to undo the work of the French Revolution was the repeal of the Title of the Civil Code on Divorce, which had been in operation since the 31st March, 1803. This was done by a law of the 8th May, 1816, and from then to 1884 the only legal remedy for aggrieved consorts was judicial separation<sup>2</sup>.

<sup>1</sup> Art. 6 of the Chart of 1814.

<sup>2</sup> Several fruitless attempts were made on the accession of Louis Philippe to revive divorce, viz. in 1831, 1832, 1833, and 1834, and the measure was persistently adopted by the Chamber of Deputies, but on all four occasions was thrown out by the Peers.



The movement in favour of the revival of divorce which resulted in the adoption of the present law was begun by M. Naquet, to whose indomitable energy its adoption may in the main be ascribed. He submitted his first proposal for the restoration of divorce in 1876, when the Republic was not as firmly on its feet as it is at present, and it simply met with ridicule as the proposal of a monomaniac. However, it was not feasible as then submitted by him, for it outstripped the original law of the Revolution in the latitude left by it to consorts in the dissolution of the marriage-tie. In 1878 he modified his proposal to better suit the spirit of the French people and confined his Bill to a revival of the suppressed Title of the Civil Code. The general Bill Committee however threw it out as inopportune. In 1879 the Bill was first taken seriously into consideration, and a special Committee was appointed to deal with it, which concluded in its favour, but the measure was thrown out by the Chamber. In December, 1881, the measure was once more brought forward, and at length in 1882 M. Naquet secured a triumph in the lower House. Two years afterwards the Bill was adopted by the Senate with certain restrictions, and it was finally passed by the Chamber as adopted in the Senate, and promulgated on the 27th July, 1884.

Though the law of the 29th July, 1884, is in form a revival of the old Title of the Civil Code, several of the old provisions have been modified in essential particulars. Thus the original Title only allowed adultery of the husband as a ground of divorce where he had kept his concubine in the marital habitation, and recognised mutual consent, with the formalities above referred to. The new Act has maintained the repeal of 1816 as regards this ground, so that divorce by mutual consent no longer figures in the French Code, and places husband and wife on the same footing as regards adultery. The old Title also forbade the subsequent marriage of the divorced parties with each other (Art. 295). The new Article forbids their re-marriage with each other only where one or the other party has subsequently to the divorce contracted a fresh marriage followed by a second divorce. A second divorce of the same parties also is forbidden, except on the ground of a condemnation to severe criminal punishment.

When divorce was abolished in 1816 judicial separation was left standing for all grounds but mutual consent. One of the Articles relating to judicial separation provided that where separation was granted for adultery on the part of the wife the judgment pronouncing the separation might condemn her to imprisonment for from three months to two years, with power on the part of the

husband to liberate her by taking her back. This ridiculous provision has been repealed by the new Act.

Lastly, the new law has introduced a new principle into the Civil Code as regards judicial separation. Under the old Title judicial separation was an alternative for divorce. Under the new Act it can be converted into divorce on the application of either of the parties after the lapse of three years from the judgment of separation, which can thus become a preliminary step to divorce.

Title VI of the Civil Code as it now stands is divided into four Chapters.

Chapter I deals with grounds of divorce, Chapter II with procedure relating to it, Chapter III with its effects, and Chapter IV with judicial separation.

The grounds for divorce enumerated in Chapter I are set forth as follows:—

Art. 229. The husband may apply for divorce on the ground of adultery on the part of his wife.

Art. 230. The wife may apply for divorce on the ground of adultery on the part of her husband.

Art. 231. Either consort may apply for divorce on the ground of serious violence, cruelty<sup>1</sup>, or injuries<sup>2</sup> on the part of the other.

Art. 232. The condemnation of one of the consorts to grave criminal punishment is a ground of divorce at the instance of the other.

Art 230 is a remarkable innovation. The simple fact of adultery on the part of the husband is a ground of divorce. The Court does not require to find circumstances of particular hardship and aggravation, but must be satisfied with the bare proof of the fact of adultery. As the law does not distinguish between husband and wife, the mode of proof must be the same, and criminal correspondence will be held to be evidence against the husband, as hitherto held against the wife<sup>3</sup>.

The effects of the adoption of this provision it is hard to foresee, but in all probability it will be long before French women will resort to the scandal of a divorce on the ground of the husband's adultery, unless the circumstances are beyond endurance. The Article itself is unquestionably a righteous one, and any distinction in the law between husband and wife in this respect would have been a travesty of the Article of the Civil Code which, laying down

<sup>1</sup> Sévices (*convitia*).

<sup>2</sup> 'Injury' is not the exact equivalent of *injures*, which means both injury and insult. It is not quite so strong as the former, while stronger than the latter.

<sup>3</sup> Appeal Court, Bordeaux, 27 Feb. 1807.

their duties, says: 'Husband and wife owe each other mutual fidelity, help, and succour<sup>1</sup>.'

In Article 231 the word 'serious' or 'grave,' which by French grammatical construction follows 'violence, cruelty and injuries,' can apply to all three.

Serious injuries (*injures graves*) is a very elastic expression, and leaves great latitude to the Court.

In Belgium, where the old Title of the Civil Code has remained in force, the Courts hold desertion by either husband or wife, coupled with circumstances indicating the persistent intent without a sufficient motive of not returning to the conjugal habitation, to be a serious injury, and as such a ground of divorce<sup>2</sup>. The petitioner's bad conduct however would be a sufficient motive for abandoning the conjugal habitation, and divorce would not be granted on the ground of an injury where this circumstance existed<sup>3</sup>.

Without actual infidelity Belgian Courts have also held that highly imprudent conduct is a grave injury and therefore a ground of divorce<sup>4</sup>. In the case in question however the husband was the petitioner. As the policy of the new French Act is to place husband and wife on the same footing in all respects as regards divorce, the French Courts will no doubt be able to consider certain aggravated circumstances of a similar kind as a ground of divorce.

The following passage from the judgment of a Belgian Court will show the spirit of the decision: 'Whereas the violation of the conjugal duties does not consist solely on the part of the wife in acts of infidelity; that this kind of injury of quite exceptional gravity is provided for in Art. 229 of the Civil Code; that Art. 231 has quite a different bearing; that it relates to imprudent conduct, to compromising *légèretés*, to disregarding of the rules of propriety, of even the prejudices of the social circle to which the husband and wife belong; that the domestic honour on which marriage reposes, as the legislature has understood it, implies real virtue and an appearance in accordance with reality; that it is not sufficient for the wife to observe the duties of fidelity, if by the anomaly of her conduct and the strangeness of her acts she affords scope for public scandal; that a wife, truly anxious to maintain the respect she owes to herself and to her husband, acts outwardly in harmony with the purity of her intentions;' &c.

Habitual drunkenness may also, according to the gravity of the circumstances, be deemed a sufficient injury as a ground of divorce<sup>5</sup>.

<sup>1</sup> Art. 212.

<sup>2</sup> Trib. Langres, 13 Aug. 1884; Trib. Verviers, 5 Feb. 1879.

<sup>3</sup> Trib. Verviers, 5 Feb. 1879; Appeal Court, Brussels, 29 May, 1874.

<sup>4</sup> Trib. Auxerre, 3 May, 1881.

<sup>5</sup> Appeal Court, Brussels, 10 Aug. 1868; Trib. Verviers, 14 June, 1880; Cass. B., 22 June, 1882.

Malicious libels of a notorious and outrageous character<sup>1</sup>, scandalous conduct generally of the husband<sup>2</sup>, and any other grave misconduct which in the opinion of the Court is such as to render reconciliation impossible, are sufficient injuries to support a petition for divorce.

Grave criminal penalties inflicted on either husband or wife are by Art. 232 a ground of divorce for the other. The penalties in question are death, penal servitude (temporary or for life), transportation, and imprisonment for not less than five years with or without labour<sup>3</sup>.

Chapter II, which forms the bulk of the Act (Articles 234 to 274), deals with procedure. It is divided into three sections: Section 1 on formalities, section 2 on provisional measures, and section 3 on grounds for rejecting the petition.

The procedure in case of judicial separation is the ordinary procedure in civil cases.

The policy of the framers of the old law on divorce, which, as before stated, has been re-enacted with a few more or less important changes, was by a special and slow procedure to deter petitioners from proceeding, and afford the parties sufficient time for reflection and reconciliation.

Thus, only the judgment is delivered in public, the rest of the procedure being carried on with closed doors. The petitioner must present his petition with documentary evidence in person. The judge initials all documents, and makes any observations to the petitioner he thinks right (Art. 237). The parties are then summoned to appear at a date fixed by the judge, when he endeavours to reconcile them (Art. 239). If he does not succeed he reports to the tribunal, and sends the documentary evidence to the public prosecutor. Within three days the tribunal, after receiving the opinion of the latter, grants leave to serve notice or refuses to grant such leave for a period not exceeding twenty days (Art. 240). Notice having been served, the petitioner appears in person and, assisted by counsel, sets forth the grounds of the petition and names the witnesses to be produced (Art. 242); the respondent replies and names counter-witnesses (Art. 243), and minutes are drawn up and signed by the parties (Art. 244).

A public hearing is then appointed, and the grounds why judgment should not be delivered are at this hearing admitted or rejected. If they are admitted, the petition is dismissed. If not,

<sup>1</sup> Appeal Court, Dijon, 30 Pluviôse, year 8; Appeal Court, Liège, 27 Jan. 1864.

<sup>2</sup> Trib. Brussels, 22 Apr. 1876.

<sup>3</sup> These punishments, technically called '*peines afflictives et infamantes*,' embrace the following separate penalties: 1. *mort*; 2. *travaux forcés à perpétuité*; 3. *déportation*; 4. *travaux forcés à temps*; 5. *réclusion*; 6. *détention*.

the petition is allowed and the case continues. This step is followed by a judgment ordering an examination of witnesses (Art. 247 *et seq.*).

The depositions of witnesses are made with closed doors in presence of the parties (Art. 253), minuted and signed (Art. 255), and judgment is delivered at a public hearing, the date of which is fixed in due course by the tribunal.

Where the ground of the petition is 'grave violence, cruelty, or injuries,' the Court may suspend final judgment for a year, during which the parties are judicially separated, to afford them time for reconciliation (Arts. 260 and 261).

Where the ground is condemnation to severe criminal punishment, the procedure is simple and expeditious, presentment of a certified copy of the final sentence being the only evidence required (Art. 261).

Just as the policy of the law is to lengthen the proceedings in first instance, it is its policy to expedite them on appeal. Therefore the appeal is dealt with as a matter of urgency, and the period for appeal has been reduced by the new Act from three to two months for appeal to the Court of Appeal, and to the same period for appeal from there to the Court of Cassation.

The actual dissolution of the marriage takes place before the registrar of births, deaths and marriages, whose registration of the judgment within two months after it has become final is the last act of procedure.

The provisional custody of the children is granted to petitioner, respondent or others, as the family or the public prosecutor may think in their interest, at the discretion of the Court (Art. 267).

The Court may also fix a place of residence for the wife pending proceedings, and order sufficient alimony to be paid her by her husband.

Lastly, reconciliation is an answer to proceedings in all their stages as well as before their commencement, and on proof thereof, if denied by the petitioner, the cause is annulled (Arts. 272-4).

The mere cohabitation of the husband and wife after knowledge of the adultery without other circumstances implying pardon by the aggrieved party, however, is not sufficient evidence of reconciliation. What the Court asks for is outward marks of peace, union, and agreement affording a reasonable presumption of real reconciliation<sup>1</sup>. Cohabitation of a lengthened character, for instance for a year, after discovery of the adultery<sup>2</sup>, raises such a presumption.

<sup>1</sup> Trib. Bordeaux, 9 fructidor, year xii; Cass. 4 April, 1808.

<sup>2</sup> Appeal Court, Riom, 18 nivôse, year xii.

Connivance and collusion are not mentioned in Chapter II under the defences, and the Courts of Belgium do not recognise them as such<sup>1</sup>.

Chapter III deals with the effects of divorce. Subsequent marriage, followed by divorce, is a bar to intermarriage of the original parties, and after their intermarriage no fresh petition on their part can be presented except where one of the parties has been condemned to severe criminal punishment after the re-marriage (Art. 295).

The wife moreover, assimilated to the widow, cannot marry until ten months have expired from the date of the dissolution of the marriage (Art. 296), nor can the guilty party intermarry with the accomplice in adultery (Art. 298).

This provision looks as unworkable as it is reprehensible, seeing that the accomplice does not figure in the action, and by French law a judgment is only executory for the parties against whom it is delivered. To prove the complicity it will be necessary to try the issue separately, or to produce a criminal sentence rendered by virtue of the Penal Code which makes adultery an indictable offence against both offenders<sup>2</sup>.

As regards the property of the parties, the successful petitioner retains all ante-nuptial and post-nuptial gifts or rights of property, and the respondent loses any such gifts or rights of property, and may be condemned to provide alimony where necessary to the extent of a third of his or her property (Arts. 299, 300, 301).

The final custody of the children falls, unless otherwise provided by the tribunal, to the petitioner; the tribunal may in fact entrust it to the respondent or a third person under the respective supervision of father and mother, who must contribute to the support of their children in the proportion of their means (Arts. 302 and 303).

The dissolution of marriage by divorce, unlike its dissolution by death, leaves all matrimonial compacts and stipulations as to the children of the marriage in connection with property intact, and at the death of the divorced parents the children of the marriage succeed to their property as if the matrimonial bond had never been severed (Art. 304).

Chapter IV treats of judicial separation which can only be granted where a petition for divorce lies. Judicial separation by consent is therefore impossible.

<sup>1</sup> 'Le mari est recevable à demander le divorce pour cause d'adultère de la femme alors même qu'il aurait établi dans le domicile conjugal un état de choses facilitant les relations coupables de sa femme. Le législateur a spécifié les fins de non-recevoir qui peuvent être opposées à l'action en divorce pour cause déterminée, et il n'a pas rangé parmi elles la circonstance que le mari aurait connu ou toléré les relations coupables de sa femme' (Cours de Bruxelles, 17 Feb. 1881).

<sup>2</sup> Vide p. 364.

Under the new Act, as has already been pointed out, judicial separation can after three years be converted into divorce at the instance of either party, and is not hampered by any special procedure.

It will have been observed that there are several important and even striking differences between the French and the English Divorce Acts.

I need not dwell on such strongly defined distinctions as the grounds of divorce. The following parallel table will bring them out more clearly than a mere recapitulation :—

FRENCH LAW.	ENGLISH LAW.
Adultery of the wife.	Idem.
Adultery of the husband.	Adultery, with incest, bigamy, or cruelty.
Violence or cruelty of either husband or wife.	Cruelty with adultery.
Injuries of either husband or wife.	Unnatural crime ; rape ; desertion with adultery.
A severe criminal sentence against either husband or wife.	

The main and essential principle of the French law of divorce, the foundation on which its jurisprudence will be built up as it has been in Belgium, is found in Art. 272: 'The action is extinguished by reconciliation of the husband and wife either after the acts for which it might have lain or after the presentment of the petition.'

On reconciliation, which must be distinguished from condonation, intent entering more into the nature of the latter than of the former, hinges the whole equity of the Act. Where reconciliation has been possible the Act will not intervene ; where reconciliation is impossible it will be operative. By this touchstone it will test all demands for divorce within the prescribed limits.

Connivance, collusion, and adultery of the petitioner, as we have seen, are not defences in French law.

English law requires those who seek justice to come to her with clean hands.

This principle, derived from the glorious maxims of English Equity and so lofty in the sentiment which dictates it, is not recognised in matter-of-fact French law, and the new Act by specifying the only defence admissible, viz. reconciliation, has forbidden any exception to the existing rule.

It is questionable whether this high and noble principle is well adapted for the law of divorce, the object of which is to dissolve

a tie which has missed its purpose, the object of which has been defeated. To prove that the petitioner has been guilty himself or herself of the offence with which he or she charges the respondent is a poor reason for keeping the marriage unbroken, and the ideal act would distinguish between counter-proof for upsetting the petition and counter-proof in self-vindication. However, this opens up the whole question of what are admissible grounds of divorce.

One very great distinction between the English and French law of divorce arises from the fact that precedents have no binding force in French law, though not infrequently invoked, recommended, and insisted upon by Counsel, and often followed by the Court as embodying previous experience in similar cases, sometimes perhaps as much for convenience' sake as for aught else. The consequence of this difference between the systems of the two countries is, that greater latitude is left to the French Court than might be left to the English Court in finding for instance sufficient cruelty, violence, and injuries, a latitude which may restrain the granting of decrees to within what many who are averse to facilities for divorce will consider reasonable limits. The English Courts require violence to be cruel and cruelty to amount to causing bodily fear, and do not recognise 'injuries' generally as grounds of divorce. French law, on the other hand, treats each of these grounds individually as sufficient, but the Courts will judge according to the possibilities of reconciliation and not on bare proof of the facts; so that the same facts may in one instance be admitted as sufficient, and in another case be held insufficient. They will judge moreover according to the rank in society of the parties, to the antecedent conduct of both, the general character of one or the other, and precedent judgments will be no guide to subsequent ones.

Another essential difference between the French and English systems resides in the different positions in litigation under the two acts of the accomplice in adultery.

Our own law in this respect is in need of reform, though it is not the French law which ought to serve as the model in this respect.

English law recognises a tort in the relations of the accomplice with the respondent, and holds him liable for damages to the injured husband. Art. 1382 of the Civil Code says, 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer,' but the divorce law does not mention the accomplice, and no attempt is likely to be made to render the accomplice liable under the above-quoted Article.

The accomplice however is not let off by French law scotfree,



though it may not mulct him in damages. The Divorce Act has not repealed the provisions of the Penal Code, which draws broad distinctions between the guilty according to their sex. Adultery being a penal offence, the accomplice is an accessory to a penal offence.

By Art. 337 of the Penal Code the wife convicted of adultery is liable to imprisonment for a period of not less than three months and not exceeding two years, power being given to the husband to arrest the course of the punishment by taking back the culprit.

There is no such penalty for the husband, and to be faithful to the spirit of the new Act the legislature will have to amend this state of the law. The husband however who keeps a concubine in the conjugal habitation is liable to a fine of from 100 francs to 2000 francs, that is £4 to £80 (Art. 339).

The accessory of the wife in adultery is liable to these two penalties of imprisonment and a fine combined. The only evidence admitted, however, is *flagrant délit* and that derived from letters and other writings of the accused.

Another difference between English and French law as regards the position of the co-respondent is, that whereas in England his marriage with the respondent is a sort of reparation to society expected of him by English morals, French law forbids marriage between the respondent and the accomplice, a provision on a level with the superannuated vindictive provisions of the Penal Code to which reference has been made above, and on which as we have seen its enforcement is dependent.

It is seen that though the new French Divorce Act has its shortcomings, it has certain provisions which our own reformers might study with profit. Our own law, like too much of our statutory law, is a mere string of detailed fragments, without any governing principle or motive, but that probably of its authors to push it through parliament by concessions to conflicting prejudices in the interest of some momentary object, and regardless of any relation to general legal policy.

THOMAS BARCLAY.

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## LORD CAIRNS.

THE sense of loss which the death of Earl Cairns has impressed upon the Bar ought not to pass without expression. I may be pardoned for wishing that the Editor had cast this duty on some one better able than I may be to pourtray the pervading sentiment without the intrusion of any merely individual estimate. The difficulty is happily lessened in this case by the universal conviction that a great personality has vanished and left a void which will not easily be filled. The later years of Lord Cairns' activity, it is true, were devoted more to political than judicial duties, but whatever the lay world may do, lawyers will not suffer the fame of the Judge to be overshadowed by the reputation of the Statesman.

Lord Cairns, first as Lord Justice and afterwards as Lord Chancellor, sat upon the Bench for a time which, though far short of the tenure of some of his famous predecessors, was long enough to establish his title to a place in the roll of our most distinguished judges. It sounds like a truism to say of a great judge that he was eminently judicial, and yet there have been judges, and very great judges, in whose honour almost every epithet of laudation would be chosen before this characteristic word. It was not so with Lord Cairns; and the barrister who recalls the time when he used to practise before him will instinctively dwell on the essentially judicial quality of his mind as the foundation of the confidence that was always reposed in him. In mere logical acumen others may have equalled though few surpassed him. In that largeness of view which alone brings the world of law into touch with the world of business Lord Cairns was never wanting. And his great distinction was, that in him these two qualities of acuteness and breadth, which have so often been found antagonistic, were balanced more happily perhaps than in any but a very few of his most brilliant predecessors.

There was a singularly convincing power in his judgments. They not only settled the law, but set minds at rest by the enunciation of broad views which commanded universal assent. Who does not remember how long and how tangled seemed the controversy as to the relative rights and obligations of Railway Companies and their Debenture Holders? Yet from the day when Lord Cairns' judgment in *Gardner v. London, Chatham and Dover Railway*

*Company* was pronounced, the dispute was not merely ended, but men whose views had previously been wide as the poles asunder, were almost instantly satisfied that the true and right solution had been found. In another contest of grave importance to the Railway world—the Vibration Case in the House of Lords—Lord Cairns for once failed to convince his colleagues, but it is not the less a signal illustration of the combined grasp and exactitude of his mind. The peculiarity of that case is, that although unfortunately—if it is permitted to regret a decision of the House of Lords—Lord Cairns was left in a minority, it is to his cogent reasoning that the mind first reverts when *Brand v. Hammersmith Railway Company* is mentioned. Even those who are least dissatisfied with the conclusion to which the Lords, however reluctantly, felt compelled to come, have never failed to acknowledge the masterly force with which Lord Cairns discussed the question. Illustrations without number might easily be given and all would be found pointing to that nicely adjusted balance of judicial qualities which one always looks for on the Bench, and which in Lord Cairns was not looked for in vain.

Nor was it only in his decisions that the judicial mind displayed itself. A judge's function is to hear and decide, and, from the point of view of the Bar at any rate, a judge who knows how to hear is quite as highly prized as one whose strength consists exclusively in his capacity to decide. Lord Cairns was equally great in both. To hear well means for a judge to get the greatest amount of aid which can be got from the arguments of counsel, and at the same time to check effectually the waste of time upon ingenious sophistry. Few judges ever combined these ends more satisfactorily than Lord Cairns. No one ever complained of him that he was too reticent or too outspoken. If he never kept Counsel in the dark as to what was passing in his mind (as, if tradition may be relied on, was the fashion of some judges of old), or silenced them with contradictions (as other ancient dignitaries are reported occasionally to have done), he knew well how to curtail an argument in which a fallacy was veiled in periphrastic amplitude of language. Without a trace of assertion he would cut short the flow of sophistry with a grave question whether the argument did not come to this or that, and then would follow a terribly accurate paraphrase so unmistakably clear as to close once for all any further contention on the point. And yet with all this power of criticism and irony he was patient beyond most; a virtue not to be lightly esteemed in any, and, unlike other virtues, most difficult of all to minds as strong and clear as his.

The same insistence upon candour and directness which he manifested as a judge had marked his successful career at the Bar. He could be subtle enough when refined distinctions were called for, but no one ever knew him to condescend to the crafty and evasive ingenuity of the mere tactician. He was an advocate without guile, and when called upon to assume judicial office he had nothing to unlearn.

From another aspect lawyers will long recall his memory. He largely shared in all that has been done and attempted for the amelioration of the law. Three great efforts have chiefly characterised the reforms of our generation. One has thus far almost entirely failed—two have produced abundant fruits, and promise more. In all of them Lord Cairns was a prominent actor. The failure was the attempt to simplify the title to land by a universal system of registration, and it failed, as many other like attempts have done, because it was in advance of the times. Three things were needed for real success. First, there must be a perfect survey of the whole country; secondly, every estate must be vested in some person with the powers of an absolute owner, reducing all derivative interests, as in the case of stock, to equitable rights; and lastly, the State must compensate owners for the consequences of official errors. The survey did not exist; opinion was not and is not even now fully ripe for the needful changes; and it casts no discredit on the efforts of Lord Cairns and those who worked in the same direction that complete success was not achieved.

The second important reform of our times relates to a kindred matter. By successive legislation, to which Lord Cairns largely contributed, the facilities for dealing with settled estates have been enlarged to an extent which some have thought almost revolutionary, but nearly all admit to have been highly beneficial.

And the last and greatest reform, that of our forensic machinery, has achieved a measure of success which, large as it is, must inevitably become still greater. It is pleasant to remember that we owe all that has been done in this matter to the hearty co-operation of the distinguished lawyers who successively occupied the Woolsack. On many not unimportant details Lord Cairns contended manfully with varying success for the opinions which he had formed, but he concurred with Lord Selborne in the determination not to allow a great work to be imperilled by inevitable differences of view on minor points. The slightest trace of personal jealousy, such as in former times has thwarted many a hopeful project of legal reform, would have left us still at the mercy of our strange old dual system, with one set of Courts to establish rights which another set of Courts was appointed to destroy. Throughout the controversy it

was felt that it mattered little whether the one political party or the other was in power. By setting patriotism before the thought of personal fame Lord Cairns gained more honour for himself than if he had made it his chief object to attach his own name to the reconstruction of our system of Judicature. An example such as this is certain to live, and is as full of hope for the future as of satisfaction for the past.

Mingling with regret there are none but noble memories associated with the name of Cairns.

G. W. HEMMING.

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## REVIEWS AND NOTICES.

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[Short notices do not necessarily exclude fuller review hereafter.]

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*The proposed Codification of our Common Law*, a Paper prepared at the request of the Committee of the Bar Association of the City of New York, appointed to oppose the measure. By JAMES C. CARTER. New York: Evening Post Printing Office. 1884. 117 pp.

*Codification in the State of New York*. By ROBERT LUDLOW FOWLER. Second Edition. New York: Martin B. Brown. 1884. 69 pp.

It is seventy years since Thibaut and Savigny marshalled the opposing hosts of learned Germany in the great contest as to the desirability of Codification. A similar debate now divides the jurists of New York, and it rages round a practical question. In accordance with a provision of the State Constitution, Mr. D. Dudley Field and others were appointed in 1847 and again in 1857 as Commissioners to codify the whole law of the State. Of the five Codes prepared by these gentlemen, the Code of Civil Procedure, the Penal Code, and the Code of Penal Procedure have become law. The Civil Code has twice passed the Legislature, but has been vetoed on each occasion by the Governor. It has lately been again brought forward, and on 9th April was read in the Assembly a second time by 62 votes to 35. The lawyers of the State are, it seems, as a body, opposed to the Code, indeed to any Code, and Mr. Carter's pamphlet has been written at their request. Mr. Fowler writes on the other side, and his pamphlet has been widely circulated by a committee, which apparently represents the views of an important minority of the profession, as well as those of the lay public. Quite apart from the merits of Mr. Field's Code, Mr. Fowler appears to us to have the best of the argument. He slays once more, *secundum artem*, many an objection to Codification which one might have supposed had long since been finally disposed of. The relation of a Code to the Common Law is well described in the following passage: 'What the lawyer does in his daily practice, the codifier does on a larger scale; both seek for the law in the reports, but in the reports unfortunately burdened with the scholia of the text-writers and with the wearisome utterance of many a commonplace or indiscriminating official. When the codifier has found these laws he lodges them between single covers, that common people, and not logicians and experts alone, may better apply them to the myriad, shifting phases of human affairs.'

T. E. H.

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*Commentaries upon International Law*. By the late Sir ROBERT PHILLIMORE, Bart., D.C.L., &c., &c. Vol. III. Third Edition. London: Butterworths. 1885. 8vo. xxxi and 964 pp.

THE first edition of Sir Robert Phillimore's Commentaries appeared in 1854-61, the second in 1871-4. The publication of a third edition commenced with the reissue of vol. i. in 1879. Vol. ii. followed in 1882; and

the lamented author was engaged upon vol. iii. at the time of his death in February last. His son informs us, in a short preface, that the alterations and additions, 'which are not many,' to this volume were all made under the direction and with the approval of the author. The work has therefore assumed its final form; and is practically complete, since vol. iv. is a separate treatise upon Private International Law, or, as Sir Robert Phillimore preferred to describe this topic, upon 'Comity.' Of the 'Commentaries,' as a whole, it is unnecessary to say a word. The book is in the hands of every international lawyer, and has long been recognised as in many respects worthily representing the traditions of the College of Advocates, of which its author was one of the few surviving members. Volume iii, which deals with 'War' and 'Neutrality,' derives additional value from the author's practical experience in the Prize Courts. The new edition of it has, generally speaking, been posted up to date, but so briefly as to correspond, almost page for page, with the edition of 1874. T. E. H.

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*Constitutional Law viewed in relation to Common Law and exemplified by Cases.* By HERBERT BROOM, LL.D. Second Edition, by GEORGE L. DENMAN. London: W. Maxwell & Son. 1885. 8vo. 1026 pages.

*Broom's Constitutional Law* presents a favourable specimen of an objectionable kind of publication.

The merits of the book are obvious. It contains a good deal of information not easily to be found in any other single work; the part of it which is written by Mr. Broom is, like all his writings, marked by a certain ease of style; there is moreover perceptible here, as elsewhere in Broom's treatises, an effort to rise above the lower level of legal authorship.

The objections to Broom's *Constitutional Law* are quite equal to its merits. It is the production of a teacher who held no firm grasp on principles; it is in its form merely a mass of notes on more or less leading cases. In such a book, doctrines of law are not offered to the reader in either of the two shapes in which alone they can be stated with lucidity. They are not traced out historically in accordance with their development, they are not laid down dogmatically in accordance with their logical relations. This habit of expounding different branches of law in the shapeless form (if the expression may be allowed) proper to a note-book is an error which, just because it has grown inveterate among English lawyers, needs stern correction. The original sin, moreover, committed by an author who publishes a commonplace book instead of a treatise is greatly aggravated by the subsequent offence of an admirer who falls a victim to the fallacy of re-editing. We have not a word to say against the way in which Mr. Denman has done his work; what we do say is that he had far better have left the work alone. It is painful to anticipate the time when some five or six successive editors shall have overlaid Broom's notes on *Constitutional Law* with layer after layer of accumulated and undigested cases. If any one wishes to see the effect of the manner of writing and re-editing which is the object of our censure, let him read *Calvin's Case* with the notes on it, and then try to state in plain and short language what are the principles which govern the acquisition and loss of British nationality. The student who tries the experiment will find, we suspect, that the combined instruction of two able lawyers has only darkened knowledge. A. V. D.

*Leading Cases in Constitutional Law, briefly stated ; with Introduction and Notes.* By ERNEST C. THOMAS. Second Edition. London: Stevens & Haynes. 1885. 8vo. 123 pages.

*Thomas's Leading Cases in Constitutional Law* is a small and unpretentious little book of a novel and valuable kind.

It states in a terse form the gist of from sixty to seventy decisions on the law of the constitution, and these decisions are so arranged as to elucidate the guiding doctrines. We have never looked at a book which brought out more clearly the legal character of a subject which is often supposed to consist in the main of conventions. The ultimate value of Mr. Thomas's work depends upon the accuracy with which he has given the effect of the different judgments which he summarises. On this vital point we can speak of his book, as far as we have been able to study it, in terms of high praise. It is hardly to be hoped that his little manual should be absolutely free from errors. He has for example, in common with writers of great authority, used language about *Buron v. Denman* which, if taken literally, would ascribe to that case the maintenance of a principle far wider than is necessary to support the judgment of the Court. But this isolated mistake is one of those exceptions which call the reader's attention to the accuracy which all but invariably marks Mr. Thomas's statement of the law.

A. V. D.

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*The Law of Mortgages of Real and Personal Property, including also the law of Pawn or Pledge and Collateral Securities, as determined by the Courts of England and the United States.* By CHARLES T. BOONE, LL.B., Author of 'Law of Corporations,' 'Real Property,' &c. San Francisco: Sumner Whitney & Co. 1884.

UNTIL recently, legal text-books have been of two sorts, the digest and the treatise. In the former, the writer tabulated the reported cases in as convenient a shape as his ingenuity could devise ; in the latter, he strove to embody the principles governing a certain branch of law with his own comments thereon, using the reported decisions to elucidate and exemplify the principles and to support his comments, or, when he believed the decisions erroneous, to illustrate the errors consequent on a misunderstanding of the same principles. This last sort of book had a value of its own, if it had a value at all ; the first sort was worthless, except as a guide to the decisions themselves. Some years ago, however, certain authors, who lacked either the courage or the ability to write a treatise, believed that they could unite its merits to those of a digest by joining together somewhat hazy abstracts of the reported cases with an 'and' or a 'but,' according as the cases differed from or agreed with each other, and by writing 'Treatise' on the title-page of the book. Such works have become very common, at least in America. Ingenious as the scheme was, however, the result was still a digest and was nearly useless without a complete law library, as no careful lawyer ever quoted a case as authority without examining it at large. Under these circumstances it occurred to some clever man that the bulk of a digest might be greatly reduced by leaving out both the hazy abstracts and the connecting particles, substituting therefor a brief heading calling the reader's attention to the matters involved in the decision, without much regard to what the decision really is.

Boone on Mortgages is put together on this principle ; it is true that the



islands of text in the sea of cases profess to contain statements of principles, but these statements are often so loose as to be misleading or valueless. For instance, in § 62 it is stated that mortgages have priority in order of record, whereas in some States the first mortgage has absolute priority if recorded within a certain fixed time. Again, in § 68 it is stated that a second mortgagee, taking with notice of a prior unrecorded mortgage, cannot gain priority by recording, but it is not stated whether the first mortgagee can proceed at law or is forced into equity; in fact, the rule varies in the several States. To offset these shortcomings, Mr. Boone has gathered into a volume six inches high, four inches wide, and an inch thick, all the cases bearing on mortgages, both of real and of personal property, and has so arranged them that they may be found with considerable ease. This is no light task.

In England the courts of equity have, as Mr. Coots says, declared that a mortgage is intended as a mere pledge; but it is difficult to believe without examination how far this doctrine has been carried in America by the genius of the people and, in some jurisdictions, by the fusion of law and equity. For instance, in many States the claim of the mortgagee is barred by the Statute of Limitations, whenever the Statute has run on the promissory note which the mortgage is given to secure, and the Supreme Court of the United States has said (*Carpenter v. Longan*, 16 Wallace, 271): 'The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.' In the case just quoted and in *Union College v. Wheeler*, 61 N. Y. 88, the Court was called on to decide whether or not the assignee for value and in good faith of a mortgage and the note or bond which it was given to secure took it subject to equities existing against his assignor. The two Courts came to different conclusions, but their reasoning is equally interesting. In the first case the debt was evidenced by a negotiable promissory note, and the Court, after using the language above quoted, treated the mortgage as a chose in action negotiable by the law merchant. In *Union College v. Wheeler*, where the debt, according to the custom in New York, was evidenced by a non-negotiable bond, the Court held that the mortgage was a chose in action, that it was not negotiable by the law merchant, and that, therefore, the assignee took it subject to equities. Commissioner Dwight said, 'The result is that the plaintiff in the present case (the assignee) takes subject to the rights of' the holders of the prior equity 'by reason of the equities between them and Nott (the assignor), and without reference to any actual or even constructive notice of such equities as between' them and the mortgagee. The notion that a mortgage is in any sense a conveyance of land the judge distinctly repudiated. Again, the doctrine of tacking has never found favour in America, but this is partly because the registry laws make the doctrine very rarely applicable, and partly because the mortgagee is not generally considered to acquire the legal title to the land. It has been held in a number of American cases that the purchaser for value and in good faith of a junior equity can, after notice of the prior equity, protect himself against it by getting in the legal title.

To offset the 'mitigations' of the common law, just mentioned, in most of the New England States a mortgage may be foreclosed by a peaceable entry on the mortgaged premises, properly avouched, which foreclosure becomes absolute if the land is not redeemed within a short period. To most of these matters Mr. Boone refers in such a way as to call attention to

them ; of course, he cannot state them exhaustively. As a table of cases would have increased by half the size of the work, he has omitted it, but his index is good and full.

FRANCIS C. LOWELL, Boston, Mass.

*Year Books of the Reign of King Edward the Third. Years XII and XIII.*

Edited and Translated by LUKE OWEN PIKE, M.A., of Lincoln's Inn, Barrister-at-Law. Published by the Authority of the Lords Commissioners of Her Majesty's Treasury, under the Direction of the Master of the Rolls. London, 1885. cxxxvii and 417 pp.

BEFORE we speak of the inside of this book a word is due to its outside. Hitherto the volumes of the Rolls Series have come to us in a binding which, if ugly, was decent and serviceable. Now there is a change for the worse. The new dress is thoroughly bad and mean, and very quickly becomes shabby and dissolute. Something might indeed be said against putting all the members of this series into the same garb, for they present to us every grade of editorial workmanship, from the highly and conscientiously finished to the merely scamped. But, at any rate, Mr. Pike's book deserves a better binding. It might be rash to say very much of so many-sided a work before it has been subjected to many different tests, but one may see at once that the Editor has brought to his task skill, and care, and patience. Undoubtedly it is the best specimen of a Year Book that we have. For the first time there has been a thorough collation of various manuscripts. Whether all the accessible materials have been used we cannot say. Manuscript Year Books are by no means very rare, and their disorderly state, the result of errors in binding and the like, makes necessary a prolonged search for the reports of any given year. For example, in the University Library at Cambridge there is a book which contains reports for the years immediately preceding and following that with which Mr. Pike has been concerned, but no cases from that year are to be found, at least in their proper chronological place. Throughout the greater part of his course the Editor has had before him four manuscripts, and the results of his collation of them are of great value. The language of the Year Books is so brief, so allusive, and sometimes to us moderns so obscure, that a variant which at first looks trivial may make all the difference between an intelligible and an unintelligible report. But this is not all, for contrary to general expectation we sometimes find that two manuscripts will give two quite different versions of the same case, versions which will differ from each other much in the same manner as the report in the Law Times will differ from that in the Law Journal. It is stated by Bacon and Plowden, and has generally been believed, that the Year Books were the work of officers of the Court and bore the sanction of public authority. We may have to revise this as well as many other opinions if Mr. Pike in future volumes diligently discharges what he very rightly regards as his duty, that of noting 'every difference of reading that could in any way affect the sense.'

We must be thankful to him also for having seen, and indeed for having been the first to see, that in order to make a good edition of a Year Book one should when possible refer to the original records, the rolls of the Court. To those rolls he has gone, and thence he has brought us much that will help towards a comprehension of the arguments of counsel and judges. Whether in this matter again he has done all that could be done we cannot say ; we very gladly learn that he is already engaged on the books of other

years which shall fill the strange unaccountable gap left by the old black-letter editions in the middle of Edward the Third's reign, and we would have him to understand that much is expected of him. But already he has done much, far more than has yet been done by any editor of Year Books, and the labour of finding and identifying cases in the voluminous records of this time is severe and wearisome. Still, it must be done. A Year Book illustrated by the records is the best material for the historian of English law. To print the records of the fourteenth century at length is out of the question. On the other hand a Year Book is often very dumb to us, it leaves much to be understood that we cannot understand, its *et ceteras* recall to us no common forms, when we have read the case we often wonder what it is all about. Here the record comes to our rescue; it may be long and verbose, but it will be intelligible. On several occasions Mr. Pike has used the record to good purpose. References to Fitzherbert's Abridgement and an index which is almost a digest are also things for which we must be grateful. In making this index and in verifying his own translation Mr. Pike has had the use of an English version and abridgements of some of the cases made by the late Serjeant Manning. In this he has been fortunate, as all will say who know anything of the work of that learned lawyer: for the word 'learned' is here no mere courtesy; all serjeants at law may be learned in law; Manning was learned in fact. Altogether even those who are cautious and duly impressed with the gravity of the occasion (a national edition of a Year Book is no light matter, but invites a searching criticism) will still have to confess that Mr. Pike has worked hard and well. The reports contained in this volume (they have never before been printed) are about of the average interest. They contain little to surprise us, and Fitzherbert has skimmed their cream. But several important doctrines are brought into clear prominence, and modern print and an English translation will enable even a professed student of the black-letter books (if any such there be) to comprehend some things which have hitherto been dim and unreal. Some of the more interesting cases are ably discussed and illustrated from other sources in the Editor's Introduction. The chief value however of that Introduction lies in a considerable contribution to the history of trial by jury. It deals rather with the thirteenth than with the fourteenth century, but we have not the heart to say that such good matter is out of place. Mr. Pike thinks that historians in general have erred as to the true relation of the *jurata* to the *assisa* and as to the exact meaning of the phrase *assisa vertitur in juratam*. Perhaps he has exaggerated a little the difference between himself and the best modern writers—Brunner, for example; but undoubtedly he has made a very clear statement about a topic of no little importance, has shown in himself a good right to an opinion, and has put in evidence some records of the early part of the thirteenth century which are not the less valuable because they now find themselves in print for the first time.

F. W. M.

*Das Edictum perpetuum. Ein Versuch zu dessen Wiederherstellung. Mit dem für die Savigny-Stiftung ausgeschriebenen Preise gekrönt.* Von DR. OTTO LENEL, ord. Professor des Römischen Rechts zu Kiel. Verlag von Bernhard Tauchnitz, Leipzig, 1883. 8vo. (Price 18 marks.)

It is remarkable that during the same year two books have been published aiming at a restoration of the two most important codifications of early

times, which through their incompleteness have for centuries instigated learned lawyers to reconstruct their contents. But whilst the work of Voigt on the Twelve Tables is the fruit of the private historical studies of its author, the origin of the work on the *Edictum Perpetuum* is due to a prize offered by the Royal Academy of Sciences of Bavaria, which has for its object the restoration of the formulae (*actionis*).

The plan of the author however goes beyond this. Being convinced that a study of the commentaries on the Edict would not only advance our knowledge of the formulae, but also that of the contents of the Edict in general, he aimed from the first at a restitution of the whole of the *Edictum Perpetuum*. He has attempted therefore to make clear the original reference of each fragment of the four great commentaries (in Justinian's Digest) of Ulpian, Paulus, Gaius, and Julian to the Edict itself, and is thus enabled to give a complete palinogenesis of these commentaries. In the special (second) part of the book, under the titles and rubrics of the single edicts, all the fragments of the commentaries referring to the particular topic in question are quoted.

On the other hand, the author has wisely abstained from restoring the formulae *actionis* where he could not base them on the contents of our sources. In opposition to Rudorff, he does not think that any reconstruction would be of value which was not founded on evidence supplied by the sources themselves. He has consequently resisted the temptation of framing a formula in cases in which only the edict granting the action has been stated, but nothing is added about the conception of the formula itself. For, as Lenel clearly shows, even in the few cases where the terms of the edict as well as those of the formula have been handed down to us, the latter are not quite in accordance with the former.

With these limitations, however, the author thinks the attempt to search for the terms of the formula a useful undertaking: a task which he tries to fulfil whilst dealing with the contents of the single edicts.

The book itself consists of an introduction and two parts. Part I (pp. 1-38) explains the system of the Edict in four chapters. Chapter I sets out the materials for settling the order in which the different topics were dealt with in the Edict. As Professor Lenel states, these materials are almost exclusively furnished by the *Inscriptiones* of the several fragments of the four great commentaries; inasmuch as these naturally followed the order of the provisions of the Edict to be explained by them. On that account these inscriptions are carefully examined by the author, who, as the result of these researches, gives at the end of his book (pp. 447, 448) a series of corrections of such inscriptions as were recognised by him to be undoubtedly wrong.

Chapter II is devoted to the consideration of the Edict as a whole. According to Lenel the Edict cannot be considered as a Code in our sense of the word. It is neither a codification of private law, nor of civil procedure for the Roman Empire (as assumed by Rudorff), nor a law of actions in the sense of all possible proceedings and their conditions (Brinz). The truth is that the praetor (*urbanus* and *peregrinus*) published edicts merely with reference to his officium; therefore his edict does not contain either the private law, or the civil procedure, or the law of actions, but so much of each of these branches as was within his officium. In case however matters relating to his office were dealt with by legislation, there was naturally no occasion for him to issue edicts on that topic, and thus the contents of the edicts are to a great extent dependent on historical accidents. Nevertheless no portion of the Edict can be said to be anomalous, for the differences appearing in

its contents are merely instances of the different functions of the officium praetoris.

In Chapter III, which deals with the chief divisions of the Edict, the opinion that the Edict is a careful system subdivided into genera, species, and sub-species is rightly rejected. As it is certain that no such system existed, investigation must be restricted to discovering the leading views of the whole of the arrangement. As the author points out, it was merely questions of procedure which gave rise to the issue of edicts, and accordingly the whole of the Edict may be divided into four parts, the contents of which are spoken of in Chapter IV.

The introductory section naturally consists of provisions intended to settle and secure the proceedings in jure down to the ordinatio iudicii. The second section deals with the different judicia which may be applicable in virtue of the praetorian *jurisdiction*, whilst a third section has for its object the regulation of such proceedings as are based on the *imperium* of the praetor. The topics of execution and querela nullitatis are the subject-matter of the fourth section, which is followed by an appendix relating to Interdicta, Exceptiones, and Stipulationes Praetoriae, and lastly the edict of the Aediles added by Julianus.

The second part of the book (pp. 39-446) contains the restitution of the Edictum Perpetuum in its 45 titles and 292 subdivisions, together with an appendix, the Edictum Aedilium Curulium, in three titles and four subdivisions. Under these headings everything is collected which refers to the contents of the Edict and the terms of the formulae. To give an abstract of these contents would be to deal with the whole *jus honorarium*. Still less would it be possible to criticise the views laid down in this part of the book. This must of course be left to those who make the particular questions a subject of investigation.

There is however no doubt that the work under consideration contains a great deal of new information on the Album Praetoris, and that it enlarges our knowledge of the classical Roman Private Law and Law of Civil Procedure.

Under these circumstances all critics<sup>1</sup> have concurred in the opinion of Professor von Brinz<sup>2</sup>, who considers the work to have successfully solved the question proposed, and the Royal Academy in Munich has, in accordance with that opinion, awarded to the author the prize founded in honour of Savigny.

E. G.

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*A Systematic and Historical Exposition of Roman Law in the Order of a Code.* By W. A. HUNTER, M.A., LL.D. Second Edition. William Maxwell and Son. 1885.

*Introduction to Roman Law.* By the same Author.

It is to be regretted that in bringing out a second edition of his well-known and in many ways valuable work on Roman Law Dr. Hunter has not seen fit to return to more traditional lines in the arrangement of his subject-matter. It may of course be said that if a writer presents us with the rules of any legal system clearly and accurately he ought to be allowed

<sup>1</sup> Cf. especially the review of Professor M. Wlassak in the *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart*. Vol. 12 (Wien 1884), pp. 255-266.

<sup>2</sup> *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, vol. IV. Romanistische Abtheilung, pp. 164-176.

to arrange them on the plan which most commends itself to him. But this argument leaves out of sight the fact that a classification based upon a theory unknown to those by whom the system was created is very apt to conceal from the student many conceptions and principles, without a clear appreciation of which the whole spirit of the law can be but imperfectly grasped, and to lead him frequently astray to false analogies and unwarrantable conclusions. Roman law is a field which presents vast opportunities of this kind, and which for that reason deserves to be tenderly handled, even by those who value it only for its use to English lawyers, and of whom we do not believe Dr. Hunter to be one. We cannot think that a reader will ever understand it one whit the better for its being arranged as Dr. Hunter has arranged it, while it must be admitted that he may very well understand it worse. For instance, we suppose that the Roman lawyers knew very well what they were about when they talked of *Status*—a term which (as Dr. Hunter very truly says) 'has in *Jurisprudence* been much given to wandering at large;' though whether on that account it may 'without impropriety be assigned to a useful and unoccupied position' (p. 138) when one is not writing about *Jurisprudence* at all may well be doubted. Nothing, again, could be better calculated to confound one's ideas on the notion of *Obligation* than the treatment of *Delicts* under the head of rights to personal security and property: and yet it is hardly too much to say that without clearly apprehending the theory of *Obligation* one cannot understand Roman law. The inclusion of '*Status*' under *Obligations* is a freak of perversity upon which comment surely is needless. For a last instance of the misconceptions which Dr. Hunter's arrangement may facilitate we may take *Contract*. It is difficult to see why *Commodatum* and *Depositum* are any more '*Equitable*' than *Sale* or *Hire*, or in what sense *Mutuum* was '*Equitable*' at all. If anything was equitable in such matters it was the remedy; and no one knows better than Dr. Hunter that the remedy on *Mutuum* was an '*action of strict law*.' And nothing could be more unfortunate than throwing some contracts into a class by themselves as '*Contracts for Valuable Consideration*.' It is enough to say that the very name suggests to the reader that there were some contracts whose validity depended on this purely English idea; but every one knows that it depended on a totally different matter.

However, we presume that it is too late to remonstrate with the author on this subject, and therefore we proceed to briefly note the points in which the second edition differs from its predecessor, premising that in general the legal exposition is lucid and accurate, and the illustrations full and well selected. The main addition is '*A Short History of Roman Law*,' by Mr. Murison of University College, London, the principal defect of which is that it attempts too much, and enters in unnecessary detail into many points of Roman political and constitutional history; there are also in this part of the book a few curious errors: e. g. p. 41, 'When the prætor introduced a new right in rem, the remedy he gave was called *interdictum*. . . . . When he introduced new rights in personam, his remedy was called *actio*' (surely Mr. Murison must have heard of the *actio Publiciana* ?); and p. 42, '*judicio imperio continentia* (binding *by imperium*)' for '*quæ imperio continentur*,' clearly the right phrase, explained by Gaius himself in iv. 104. Dr. Hunter himself has re-written his chapter on *Possession*, though we doubt much whether he will be any the more held to have proved his position that *Possession* is *Prætorian* or *Equitable* ownership originating in the refusal to peregrini of the protection of the civil law: for the assumptions on which

his whole argument is based (and of which the curious reader will find good examples on pp. 365 and 369) are so large, and at the same time so entirely unnecessary, that we shall be much surprised to find his conclusions endorsed by civilians in either this or other countries. But Dr. Hunter has now generalised upon the experiment which he made in his first edition. It was not enough that the Romans should be beholden to the peregrinus for merely one of the most famous chapters in their legal system : for he is now discovered to have been the final cause, not only of Possession, but also of the Prætorian scheme of Inheritance (p. 847) and of the formulary procedure (p. 980). To give a purely conjectural explanation of institutions, the motives of which are satisfactorily accounted for by original authorities, is scarcely in accord with the strictly scientific habit which forbade the author to adopt the Gaian classification ; and we repeat that the general merits of his book, which we frankly acknowledge, are much impaired by these eccentricities, which reappear in a more dogmatic and so an even more insidious form in the 'Introduction to Roman Law.' A last point in which Dr. Hunter has reconsidered his earlier opinions is the nature of Correal Obligation. Want of space prevents us from entering upon this difficult question, though we may admit that his present view is certainly supported by some textual authority, and has the advantage of being shared by some continental writers.

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*The Law relating to Local and Municipal Government.* By C. NORMAN BAZALGETTE, M.A., and GEORGE HUMPHREYS, B.A. London : Stevens & Sons. 1885. Large 8vo. xxxvii and 1761 pp.

In a material sense this is undoubtedly a great work. From title-page to end it contains 1798 pages. It is 10½ inches high, 7 wide, and 4½ thick, and weighs 8½ pounds avordupois. It should therefore be a formidable weapon in the hands of any lawyer.

Its object, as the authors state in their preface, is to arrange and bring together in one volume the laws which urban and sanitary authorities, as constituted by the Public Health Act of 1875, and municipal corporations are called upon to administer. The work begins with a short history of sanitary legislation, taken from the report presented to Parliament by the Royal Commission of 1869, which is instructive as showing the casual and experimental course followed by the legislature in dealing with this subject, and throwing light upon the unmeaning distinctions (even now not wholly abolished) which have prevailed between common or cognate classes of provisions for public health.

The main body of the work consists of over 140 statutes and substantial parts of statutes set out in their exact words, and accompanied by full notes and commentary. First of these come the Public Health Act of 1875, the Municipal Corporations Acts, and the Local Government Act of 1871, which establish and regulate the constitution of municipal and local authorities ; these are followed by all such other statutes as are considered by the authors either directly, or by incorporation of their provisions, to relate to the powers and duties of those authorities. These comprise the Acts relating to sewers and pollution of rivers, water, lighting by gas and by electricity, artisans' and labourers' dwellings, infant life protection, adulteration of food, nuisances (including the statutes relating to explosives, petroleum and alkalis), libraries, museums, schools of art, contagious diseases (animals), highways (including tramways), compulsory taking of

lands, burials, loans and audit ; and in addition to these the various Clauses Consolidation Acts, seven in number. This part of the work is followed by the circulars, &c. of the Local Government Board, and standing orders of the Houses of Parliament ; and lastly, by a full and well-arranged index extending over 107 pages, which no pains have been spared to render useful and complete.

If we may judge of the quality of the whole from such important portions as those relating to the Public Health Act of 1875 and the several Highway Acts, which we have examined in considerable detail, and also tested in practice, the work of annotation and commenting has been excellently done. The latter is just sufficiently full, clear, and well arranged ; and the notes of decisions not only on the particular statute under discussion, but also gathered from every other region of the law which has any direct bearing on the question in hand, are copious and useful, and with the aid of numerous cross-references (which in a work of this kind are specially necessary) enable the worker at once to collect all his materials. It would be impossible in the preparation of such a volume to have overlooked nothing, and we notice that by a curious oversight the extraordinary decision in *Maude v. Baildon Local Board* (10 Q. B. D. 394) is cited (pp. 46 and 120) as if it were a still unshaken authority, and the case of the *Corporation of Portsmouth v. Smith* (13 Q. B. D. 195) in which it was questioned in the Court of Appeal has been omitted. But it would be invidious to magnify such small errors. The work as a whole will take a high place among practical treatises of its class.

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*The Law of Real Property.* By HENRY W. CHALLIS, M.A., Barrister-at-Law. London : Reeves and Turner. 1885. xxiv and 424 pp.

THIS is a work of great originality and research. Our text-writers are for the most part content *sectari rivulos*—to note up the modern authorities ; but Mr. Challis has gone to the head-waters of the law. He has devoted himself to the laborious task of bringing the learning of Coke and Fearn and Preston into vital connection with the conveyancing practice of the present day. Considering how few practitioners have leisure or courage to grapple with the law of real property as it stood before the time of William IV, we have much reason to be grateful to an author who will take the immense pains of writing such a treatise as this. The first part of Mr. Challis's work contains an exposition of the difficult subject of Tenure. In Chapter v. we have an account of tenure by the custom of ancient demesne, which is identified with the tenure commonly but not quite correctly described as customary freehold. On this point Mr. Challis is so brief that he leaves us in some little doubt. Is the 'customary freehold' tenure confined to manors of ancient demesne ? From the general statements to be found in other authorities we had rather inferred that it is not unknown elsewhere. Again, Mr. Challis says nothing of a true freehold tenure in ancient demesne, the existence of which seems to be asserted by the Real Property Commissioners in their Third Report. The subject is not of great importance, but it would be interesting to know the exact truth about these actual or supposed tenures, if it were only for the sake of understanding the sections of the Fines and Recoveries Act which relates to lands in ancient demesne.

It is when he comes to deal with Estates, their nature and quantum, that Mr. Challis's knowledge and acumen are most clearly displayed. It is difficult to speak too highly of such a piece of work as the list at p. 265,



which exhibits the various ways in which a base fee may be or might formerly have been created. The reader who takes pleasure in subtle distinctions may turn to p. 115, where is considered the question whether the estate of trustees to preserve contingent remainders is not itself a contingent remainder. And if there be any who think that the subjects discussed in this work are of merely antiquarian interest, let them ponder the case of *Blake v. Hynes*, which is discussed at p. 227.

*The Statutes, Rules of Court, and General Orders relating to the Practice and Jurisdiction of the Chancery Division of the High Court of Justice and the Court of Appeal. With Copious Notes. Being the Sixth Edition of Morgan's Chancery Acts and Orders, thoroughly Revised and considerably Enlarged.* By the RIGHT HONOURABLE GEORGE OSBORNE MORGAN and EDWARD ALBERT WURTZBURG. London: Stevens & Sons. 1885. 723 pp.

THE table of contents prefixed to the last preceding edition of Morgan's Chancery Practice showed forty-three Acts of Parliament: eighteen of these have disappeared from the present edition, which nevertheless shows thirty-five Statutes, besides Rules and Orders. It is inscribed to the Lord Chancellor, 'under whose auspices the great work of consolidating into a Harmonious Whole the various and discordant systems of English Judicature was successfully inaugurated.' This book we have had in constant use for the last few weeks, and we have no hesitation in saying that the present state of the Harmonious Whole, so far as relates to the Chancery Division, is made to appear as intelligible as under the circumstances can reasonably be expected. We have found the cases which have been decided since the publication of the last edition carefully noted up; but in the notes to the Rules of the Supreme Court there appears too much of a tendency to refer to a number of cases strung together without sufficient indication of their particular point or effect. The fifth edition, in our opinion, was also the worse for this characteristic, although no doubt it greatly lessens the size of a law book. The consequence is, that so far as the Rules are concerned, the 'Annual Practice' is the more convenient handbook. In particular, we think the notes to Ord. xi (Service out of the Jurisdiction) are more satisfactory in the 'Annual Practice.' The subject of 'particulars' is rather inadequately treated in this edition of Morgan; in fact, the case of *Augustinus v. Nerinckx*, 16 Ch. D. 13, is not even mentioned, as it certainly ought to have been.

*Ex p. Great Western Railway*, 24 Ch. D. 569, ought we think to have been cited on p. 52, as on that particular point no cases are cited from the Law Reports. And we should have expected to find *Re Orde*, 24 Ch. D. 271, quoted at p. 81, to warn the unwary not to allow the deponent in an affidavit of fitness to describe himself only as a gentleman. It is odd to find people who think it desirable to cite so frequently from the Weekly Notes as our authors; and this affection for that generally despised publication has led them to cite *Grant v. Easton*, on p. 309, from the Weekly Notes only, though it was published in the Law Reports for August, 1884; and indeed the better reference is given on p. 330. It is perhaps ungracious to point out small matters of this kind; and it must be confessed that we have subjected the book to a very severe scrutiny. That we have found nothing more serious to criticise is in itself sufficient ground for anticipating as great a popularity for this edition as for the last.

*The Law of the Domestic Relations, including Husband and Wife; Parent and Child; Guardian and Ward; Infants; and Master and Servant.* By W. P. EVERSLEY, B.C.L., M.A., of the Inner Temple, Barrister-at-law. London: Stevens and Haynes. 1885. 8vo. 1097 pp.

THE very learned and industrious jurist, Mr. Patrick Fraser (now Lord Fraser), who, with special relation to the law of Scotland, conceived and carried into effect the plan of grouping the various subjects above mentioned under the title of 'The Personal and Domestic Relations,' may be congratulated on having seen a similar plan successfully carried out not only in America but in England. Mr. Fraser's work originally appeared in two bulky octavo volumes in 1846; and since that time his material, growing in bulk, has been split up and re-edited in separate treatises. In the meantime have appeared the American works of Mr. Reeve and of Mr. Schouler, after Lord Fraser's original plan.

Mr. Eversley has now supplied a work on a similar plan relating to English law. He has, in his preface, fully acknowledged his obligation to the several authorities above mentioned; but it is fair to Mr. Eversley to say that, by his independent arrangement and treatment, he has, for the purposes of English law, made the subject his own. His work is not, indeed, nor are either of the American works above mentioned, to be compared to the Scotch treatise for mastery of the historical learning connected with the subjects treated; nor, by consequence, is there to be found in any of these works the breadth of treatment in the discussion of principle which is characteristic of Lord Fraser's works. But Mr. Eversley has industriously collected, and has arranged and digested with lucidity and skill, all the modern cases within the range of his subject-matter. He has very judiciously introduced chapters giving a brief statement of the marriage laws of Scotland and Ireland; and he has evidently taken great pains in revising and adapting his work to the requirements of the Act of 1882, which has revolutionised the English law of property relating to husband and wife. A good test of this is to look through the passages where *Pike v. Fitzgibbon* is dealt with. The only fault which can be found is that in some of these passages he is not sufficiently decided or clear in marking the distinction between the two branches of that case, so as to show that while the Act of 1882 (by sec. 1. sub-sec. 4) overrules one branch, it leaves intact the effect of restraint on anticipation which Vice-Chancellor Malins' decision would have practically abolished.

Altogether, Mr. Eversley's book, which is completed by an adequate and well-arranged index, will be found a valuable addition to standard text-books.

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*The Law of Insanity in its application to Civil Rights and Capacities and Criminal Responsibility.* By HENRY F. BUSWELL. Boston: Little, Brown & Co. 1885. xxxviii and 595 pp.

THIS is a methodical treatise, containing the substance of a large body of American case law. Mr. Buswell has not attempted to collate the statutes of the different states on the subject of insanity; they are indeed too numerous to be included in a book of ordinary size; but we should have been grateful for an abstract or index of the statute law, such as Mr. Pope gave us in the appendix to his well-known work on Lunacy. In stating the rules which apply to insane persons and their guardians, Mr. Buswell

usually begins with the rules laid down in our own Courts, and it is interesting to observe how seldom he has to note a material variance between English and American doctrine. There has been indeed some little difficulty in fitting our Chancery jurisdiction into the American political system. The English jurisdiction 'in lunacy' belongs to the Sovereign as *parens patriæ*; it is exercised by the Chancellor, not as part of his general judicial authority, but by virtue of a special delegation. Now, is an American State *parens patriæ* in the same sense as an English Sovereign? And if it is, can its parental authority 'in lunacy' be exercised by a Chancery Court, *ex necessitate* and by analogy to English practice, without express delegation? The best authorities seem to answer both these questions in the affirmative. On the other hand, it seems that a State legislature cannot authorise the detention of persons acquitted on the ground of insanity during the pleasure of a State officer. In Michigan there was a law providing for the detention of such persons until they should be certified sane by certain officers who might be summoned by the prison inspectors; but the statute was held to be unconstitutional. 'In this country all legislation must be within constitutional limits and does not reach the full parliamentary range.'

There seems to be some difference of opinion in America as to the respective duties of the judge and jury on the trial of an issue of insanity. Mr. Buswell's account of the matter is brief, and, to a reader unacquainted with his authorities, not perfectly clear. At p. 174 he states the general rule that 'capacity to do an act is always a question of law;' but he tells us that this rule was departed from in a criminal case of *State v. Pike* in New Hampshire. The questions there left to the jury were these: whether there is such a disease as dipsomania; whether prisoner had the disease; whether the act of homicide for which he was indicted was the product of the disease. Mr. Buswell seems to think that the jury in this case were left to decide all questions of fact and law. Is it not more correct to say that all the questions left were questions of fact? The Court decided the question of law by directing the jury to acquit if they answered the three questions left to them in the affirmative.

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*The Law Relating to Canals, &c.; together with the Procedure and Practice in Private Bill Legislation; with a Map of the existing Canals in England and Wales.* By ROBERT G. WEBSTER, LL.B., of the Inner Temple, Barrister-at-Law. London: Stevens and Sons. 1885. 8vo. 361 pp.

IN an introduction of seventy-three pages, which is really the best part of this book, the author discusses the condition of this country with reference to the facilities for water carriage, and shows that the inland commerce of England suffers from the neglect to develop canal navigation.

The body of the work, or what apparently purports to be so, consists of 239 pages, of which no less than ninety-eight are occupied by printing *in extenso*, and in the same type with the rest of the text, the Standing Orders of the House of Commons of the season 1885. The author might have spared his remark that *a lengthy comment on them* (in addition?) *was needless*. The remainder of the book comprises matter which may be found useful to lawyers specially engaged upon canals. The Acts and Board of Trade Orders set forth in the Appendix as bearing on that special subject are selected with a fair discrimination. After setting out the Standing Orders in the body of the work, we should have been prepared to

find the Lands Clauses Consolidation Act and the Companies Clauses Act set forth at length in the Appendix. The line must after all be drawn somewhere; and we think it should have been drawn at the Standing Orders, which we should prefer to buy in the usual 5s. edition.

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*The Justices' Note-book.* By W. KNOX WIGRAM, of Lincoln's Inn, Barrister-at-Law, J.P. Middlesex and Westminster. Fourth Edition. London: Stevens and Sons. 1885. 12mo. 504 pp.

THE appearance of 'The Justices' Note-book' in a fourth edition is evidence of its having achieved a well-merited success.

The first part of the work consists of a brief description, in a popular form, of the duties ordinarily devolving on justices under the Commission of the Peace. Mr. Wigram discusses, from a practical point of view, the salient points that arise in the usual routine of business, and gives valuable suggestions upon the mode of dealing with them. This introductory part of the book concludes with a brief statement of the effects of the Summary Jurisdiction Acts 1879 and 1884.

The various special matters with which justices have to deal are then treated under headings arranged in alphabetical order, such as 'Canal-boats, Cattle-straying, Character, Children,' &c. The treatment is throughout simple and practical.

Amongst books written by lawyers, and primarily for lawyers, Mr. Wigram's book is exceptional for literary merit. The style is always easy and clear, and, where occasion permits, incisive and racy. He never hesitates to state the points in which his experience leads him to think the law defective; and these suggestions are put with force and an occasional touch of humour. The book is one well fitted for the general library, as well as an essential for the young magistrate.

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*The French Law of Marriage and the Conflict of Laws that arises therefrom.*

By EDMUND KELLY. London: Stevens & Sons. 1885. 8vo. xv and 158 pp.

IN this book Mr. Kelly, of the New York Bar and a practitioner in Paris, has set forth concisely the main principles which govern the marriage relation in France. The system of the French is based on the principle of *la conservation de la famille*, which plays so important a part in their legislation. The power of the parent over the marriage of the child on the one hand, the vested interest of the child in the property of the parent on the other,—these are the main bonds of the family group. Frenchmen under 25 and Frenchwomen under 21 are bound to obtain the parental consent to marriage. Failure to obtain such consent makes the marriage voidable at the instance, not only of the person or persons whose consent is required, but at that of the person who should have obtained it, who can thereby take advantage of his own wrong. After the ages aforesaid the proceeding known as serving *actes respectueux* must be taken, in default of parental consent. It is, perhaps, not generally known in England that the hardships resulting from the law are to some extent mitigated by Article 201 of the Code, which enacts that 'if a marriage has been declared void, not only the parties thereto, but the issue of the marriage shall nevertheless enjoy all civil rights resulting therefrom, if the marriage was contracted in good faith.' Absence of such good faith was held to exist in the cases of *Gallois v. Deacon* and *Dessaint*

*v. Belgrave*, where it was considered that there was an express intention to avoid the provisions of the French law. The steps which were taken by the English and French Governments last year seem well adapted for securing in England due observance of the requirements of the Code.

Mr. Kelly's book, which is well and clearly written and furnished with useful appendices, is chiefly directed to points arising from the conflict of French with English and American law in this matter. He discusses ably the question whether nationality or domicile should govern the marriage relation of persons not marrying in their own country. The chapter in which he critically compares the opposite foundations of marriage law in England and France is also of much interest.

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*Daniell's Chancery Forms. Forms and Precedents of Proceeding in the Chancery Division of the High Court of Justice and on Appeal therefrom, &c.* By CHARLES BURNEY. London: Stevens & Sons. 1885. Fourth Edition. Royal 8vo. lxxxviii and 1172 pp.

THIS new edition of the standard work on Chancery Procedure has been brought down to the most recent date. Since the issue of the third and last edition, the important changes introduced in practice, notably by the Rules of the Supreme Court 1883, have rendered necessary a thorough revision of the whole work; and an examination of this volume shows that this has been conscientiously and effectually done throughout. The forms given have been carefully collated with those issued from the central office, and, though the work is the result of private enterprise only, they may be considered to have an authority almost official. Many of the chapters have been revised by persons specially qualified to deal with their contents. Thus chapter xxxviii, dealing with recent conveyancing legislation, has been revised by Mr. Wolstenholme. Although written with the utmost conciseness, the work forms a ponderous volume. It contains nearly twelve hundred pages of closely printed matter, and to the ordinary layman the practice of the Chancery Division must continue figuratively as much a sealed book as if Mr. Burney or his predecessors in labour had never essayed in this way to pick out the crow's eyes.

It remains to add that the paper and printing are all that can be desired, and that in the table of cases will be found references to cases down to March, 1885.

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*The Law of Private Arrangements between Debtors and Creditors, with Precedents.* By REGINALD WINSLOW. London: William Clowes & Sons, Limited. 1885. 8vo. xxvii and 266 pp.

PRIVATE arrangements with creditors are very frequent and are full of pitfalls, and a book like that before us has long been wanted. One great difficulty in the matter arises from the doctrine peculiar to English law, that a money demand cannot be satisfied by the payment of a smaller amount even with the consent of the creditor. In the words of the late Master of the Rolls in *Couldery v. Bartrum* (19 C.D. 394), a creditor may accept for his debt a canary or a tomtit if he choose, but not 19s. 6d. in the pound. This doctrine, started in *Pinnel's Case* (5 Rep. 117 a) and recognised in *Cumber v. Wane* (1 Str. 426), has been finally established by the House of Lords in the recent case of *Foakes v. Beer* (9 App. Ca. 605).

Another lion in the path is the fact that under the last Bankruptcy Act

an assignment for the benefit of creditors is in itself an act of bankruptcy. This places the trustee of such a deed in a dangerous position, as he has of course no right to meddle with the assets after notice of such an act. This difficulty, it is suggested with considerable ingenuity, may be evaded if the trustee wait three months, after which period the act of bankruptcy is not available. The author indeed seems to think that even otherwise the trustee may be allowed his costs so far as his interference is beneficial, but as to this we think he is perhaps rather too sanguine. Indeed, Mr. Winslow seems to deal with the subject with a certain *naïveté* as if hardly aware that private arrangements with creditors are now considered as against public policy. However, some mitigation of the rigour of the law in this respect is not improbable, and even as the law stands this work is one likely to be of much use in the frequent cases where it is desired to administer a debtor's affairs outside the Bankruptcy Act.

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*Reports of Cases in the Court of King's Bench [1753-4].* By JOHN DUNNING, LORD ASHBURTON. With Notes. By CHARLES G. DELANO, of the Massachusetts Bar. Boston, Mass.: George B. Reed. 1885. Large 8vo. x and 65 pp.

WE have here a publication of MS. notes found in an interleaved copy of Sayer's Reports, which give a better account of cases there reported. It cannot be expected that the contents should be of any great practical interest at the present day; but the volume is prettily got up, and is a pleasing example of the historical piety of American lawyers.

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*Principles of Contract, etc.* By FREDERICK POLLOCK. Fourth Edition. London: Stevens & Sons. 1885. 8vo. lxxxviii and 744 pp.

THE author takes this opportunity of correcting an oversight to which a learned friend has kindly called his attention. On page 205 the statement that a negotiable instrument cannot be made payable to the treasurer or other officer for the time being of a society is repeated from former editions. This is no longer the law, for by the Bills of Exchange Act, 1882, sect. 7. sub-sect. 2, a bill (or cheque or note, see sects. 73, 89) may be made payable to the holder of an office for the time being. 'Per reson et entendement poet home ovesque temps et diligence conustre la cōmen ley, mes les statutz nemye.'

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*English Citizen Series. Justice and Police.* By F. W. MAITLAND. Macmillan & Co. 1885. viii and 176 pp.

THE preparation of this volume was originally entrusted to Mr. Ilbert; when he went to India the subject was transferred to Mr. Maitland, who has performed his task in a very workmanlike manner. His style is plain and concise, and he has compressed a vast amount of information into a little book. Lawyers cannot expect to find much that is new to them in the chapters concerning the courts of law; but even the learned reader may derive profit from Mr. Maitland's exposition of the duties of magistrates and constables. Our administrative law is such a chaos of statutory provisions that we are glad to have a competent guide who can give us something better than an alphabetical clue to the legislative maze.

*A Concise Abridgment of the Law of Real Property.* By JOSEPH A. SHEARWOOD, Barrister-at-Law. Third Edition. Stevens & Sons. 1885. xvi and 261 pp.

THE fact that a work of this kind has reached a third edition may be taken to prove that it has been found useful by candidates for examinations, for whose use it was compiled. Mr. Shearwood has considerable skill in brief and clear explanation, but his language is often too lax and colloquial. He gives a chapter to 'Estates held Promiscuously,' by which he means estates held in joint tenancy, &c. The title 'Voluntary Alienation' is made to cover all modes of alienation which are voluntary in the popular sense of the word—an arrangement which may cause the student some little difficulty when he comes to the distinction between a voluntary conveyance and a conveyance for value. Where Mr. Shearwood has to speak of seisin he is never sufficiently precise, and at p. 228 expressions are used from which the student might infer that seisin and possession are convertible terms. It is extremely difficult to be both concise and accurate in stating the rules of real property law, and therefore we do not wish to make too much of these defects. When a Fourth Edition is called for, Mr. Shearwood may be able to attain a more scientific accuracy in the use of terms, without impairing the value of his work as an elementary text-book.

*A Guide to Election Law and the Law and Practice of Election Petitions.* By YARBOROUGH ANDERSON, M.A., LL.B., and CHARLES EDWARD ELLIS, B.A. Being the Fourth Edition of Leigh and le Marchant's Election Law. London: Wm. Clowes & Sons. 1885. 8vo. xvi and 460 pp.

THIS book has attained its fourth edition within twelve years from its first appearance. The present edition is in large part rewritten, and much excels its predecessors in bulk and appearance. In some respects more labour might with advantage have kept the book smaller. For example, the 'C. and I. P. Act, 1883' accounts for more than seventy fresh pages. It is printed whole in the Appendix, and all its leading sections appear verbatim in large type and half margin in the text, where we should have preferred to have its provisions stated in less cumbrous language in the text.

The book is called 'A Guide to Election Law,' but its second title better indicates its scope. It will be far more 'A Guide to the Law and Practice of Election Petitions' than a guide to a candidate or agent in the actual conduct of an election. The legal proceedings consequent on transgressions of the election laws, and in particular the practice upon election petitions, are given with a very useful fulness of detail.

*Les auteurs présumés du Grand Coutumier de Normandie.* Par E. J. TARDIF. Paris: Larose et Forel. 1885. 8vo. 55 pp.

M. TARDIF, without positively committing himself to a theory of the authorship of the Customal, puts forward certain conclusions as resulting from a comparison of the mediæval tradition of the Channel Islands with the indications afforded by the book itself. We hope to recur to the subject in connection with the Latin text, of which a new edition, undertaken by M. Tardif for the Historical Society of Normandy, will shortly appear.

*Principles of the Law of Real Property, &c.* By the late JOSHUA WILLIAMS. The 15th Edition, by his son, T. CYPRIAN WILLIAMS. London: H. Sweet & Sons. 1885. 8vo. xxxviii and 708 pp.

STANDARD books are often spoilt by bad editing; many books which are very good in their day are not capable of being fitted for the use of later times by any process of editing, and break down under the weight of accretions; but when a book is thoroughly good work to begin with, and the subject one that is continuously developed, not revolutionised, there is no reason why, with good editing, it should not see many days after the author's last hand has left it. So it is with 'Williams on Real Property.' In the present edition we note with great contentment that Domesday and the Hundred Rolls have been brought under contribution, and the introduction to the law of copyholds is entirely recast for the purpose of taking due account of the present state of historical knowledge and research.

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*The Law of Theatres and Music Halls.* By W. N. M. GEARY, Barrister-at-Law, J.P. With Historical Introduction by JAMES WILLIAMS, B.C.L., Barrister-at-Law. Stevens & Sons. 1885. xii and 230 pp.

MR. GEARY has discovered that there is no work which sets forth in an adequate manner the law relating to places of public amusement. He has supplied this gap in our literature by giving us an exposition of the two statutes which regulate the licensing of stage-plays and of theatres and music-halls; and he has added the justices' rules and sections of local Acts which apply to places of amusement in thirty-four towns of importance. A chapter on Contracts and another on Torts and Crimes complete the work, which will no doubt be found useful by managers and others connected with theatres.

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*A Concise Guide to Modern Equity: being a course of nine Lectures* (revised and enlarged). By ARTHUR UNDERHILL. London: Butterworths. 1885. 8vo. xvi and 265 pp.

THESE lectures, as delivered to the students of the Incorporated Law Society, and now published, appear to us to have been framed on an erroneous conception of the special function of oral teaching. Mr. Underhill seems to think that subjects on which the text-books are 'necessarily dry and formal' can with advantage be 'more lightly treated in the form of a lecture.' We do not agree to either of the propositions here stated or assumed. There is no reason why a text-book should be drier than a lecture, except that a lecturer can less afford to be dull; and there is much reason why a lecturer should be even more careful of accuracy than a writer. In the detailed treatment of a subject many slips may be forthwith corrected by the context, or may correct one another. When the same matter is 'more lightly treated,' by which we suppose Mr. Underhill to mean reviewed in its general outlines, errors which in a fuller context would be venial become dangerously misleading. It is a yet graver mistake to think that a flippant manner will carry off dull matter. The only road to successful teaching is to make the matter itself interesting by a careful selection of the points to be dealt with, and lucid and thorough treatment (not necessarily detailed, but scrupulously exact as far as it goes) of those chosen points.



This is a thing easier to say than to put in practice, as all know who have tried; none the less it is the thing to be aimed at.

Unfortunately, Mr. Underhill has confused the lightness of a strong hand, bred of thorough mastery, with the erratic lightness of an uncertain grasp: and his work is frequently disfigured by annoying slovenliness in form and detail. We have heard of a suit in equity, and of an action in the Chancery Division, but not of an 'action in equity.' Mr. Underhill ascribes 'Imperial jurisdiction' to the King's Court in the twelfth century, speaks of 'what was for centuries known as an action on the case,' as if it had gotten some new name since the Common Law Procedure Acts, and pities those who forget 'the fact that cases are rarely of a simple and uncomplicated character.' Contested cases, we presume, are meant, for the majority of actions in which a writ is issued are wholly undefended; but even of those which are tried out some three-quarters go in the plaintiff's favour. We read that 'Trusts were entirely unknown to the Common Law, which regarded them as merely binding on the conscience. Equity, however, with more justice, held,' &c. This is an odd inversion. The historical fact is that the Chancellor enforced trusts because he deemed them binding on the conscience, and the courts of law left that business to the Chancellor because they in turn deemed them binding on the conscience only. If Mr. Underhill had paid more attention to the history of the law, he might elsewhere have spared (to use his own adjectives) 'a very cheap and somewhat cynical' sneer at the words of the Marriage Service, and a hopeless confusion between *vivum vadium* and *mortuum vadium*. 'Carlisle' is quoted as an authority for the golden quality of silence, and 'Je y' suis, je y' reste' is printed as French: blunders which, with ordinary care, neither author nor printer should have made or overlooked. We have noted other blemishes besides in the way of loose statements, flippant expression, and names of cases misprinted or given with imperfect references; but these examples may suffice. Mr. Underhill's book needs much correction before it can be safely taken as a guide even for examination purposes.

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*Men-at-the-Bar: a biographical hand-list of the members of the various Inns of Court, including H.M. Judges, &c.* By JOSEPH FOSTER. London: Reeves & Turner. 1885. Large 8vo. xiv and 528 pp.

MR. FOSTER'S industry in this kind of work is well known; it is certain that in the volume before us he has collected much useful matter of reference; it is probable that the omissions and inaccuracies are not more than according to the natural course of human accidents were to be expected in such an undertaking. We are bound to say, however, that a very short examination has shown room for amendment. There is a want of consistency in the information given as to titles, offices, marriage, and authorship of works, which is sometimes full, sometimes abridged, and sometimes wanting. Thus we are told of Mr. D. W. Freshfield's position in the Geographical Society, but not of his published books. Mr. Justice Stephen's 'History of the Criminal Law of England' is overlooked in the list of his works, unless it is purposely lumped in under an 'etc.,' which is a rather less favourable supposition. Under one name we have found two easily avoidable mistakes: Mr. R. G. Marsden is described as 'undergrad. Merton Coll. Oxon.'—whereas according to the University Calendar he took the B.A. degree in 1869 and the M.A. in due course afterwards—and as author of a book called 'Law of Maritime Nations,' which is by no means the same thing as the Law of Collisions at Sea. We do not see the necessity or convenience of

inventing a compound noun 'Man-at-the-Bar,' nor the propriety of calling a volume of this size a hand-list. But these are verbal trifles. The other matters are small, but in a work of this sort not trifling.

We have received the following letter from Mr. W. E. Grigsby.

*To the Editor of the 'Law Quarterly Review.'*

DEAR SIR,—The Reviewer of my edition of Story's Equity Jurisprudence makes the following statements:—

(1) 'That the additions made to the text and notes in the recent American editions are out out.' If your Reviewer had read my short Preface carefully he would have seen that it is only American cases and text and notes founded on *them* which have been omitted, the English cases bearing on Story's text which are found in recent American editions are found in mine. Thus there is a complete chain of English cases from Story's first edition to mine.

(2) 'That my work is totally inadequate.' In support of this proposition your Reviewer makes the following charges:—

(a) 'That the reader is left in ignorance whether full payment of the purchase-money for land will take a case out of the Statute of Frauds.' The words in the text (see § 760) are, 'It seems formerly to have been thought that . . . payment of the purchase money . . . was such a part performance as took the case out of the Statute. But that doctrine was open to much controversy, *and is now finally overthrown.*' The note of Mr. Justice Story has been retained in all American editions, which editions your Reviewer does not seem to have consulted.

(b) That 'Part-performance' and 'Retainer' are not titles which appear in the Index. This is literally true, but your Reviewer forgets to add that 'Part-performance' can be found under its proper title, Specific Performance, and that 'Retainer' can be found under its proper title, 'Executor,' and that this is the course which has been followed in every edition of Story.

(c) That 'the law relating to the rebuttal under the *locus parentis* doctrine of resulting trusts is illustrated only by a judgment in Cox and a reference to Keen.' Your Reviewer's language is somewhat unusual, but supposing that he refers to the doctrine of advancement as rebutting resulting trusts, let me refer him to the cases on p. 836, *In Re De Visme*, 2 De G. J. & S. 17, and *Bennet v. Bennet*, 10 Ch. D. 474.

(3) Your Reviewer states that my views as expressed in my preface 'concerning the effect of recent legislation show an entire want of practical experience.' My views are:—

(a) That recent legislation has modified or altered the principles of equity which prevailed in Story's time.

(b) That the Court of Chancery has ceased to exist.

(c) That the fusion of Law and Equity is one of organisation.

(d) That the principles of Common Law have been superseded by those of Equity whenever they come in conflict.

(e) That the administrative machinery of the Court of Chancery has been adapted to all the Divisions of the High Court.

I leave it to you and your readers to judge which of these statements 'show a want of practical experience.'

Yours faithfully,

W. E. GRIGSBY.

49, Chancery Lane.

It may be convenient to explain that, while we cannot as a rule publish

controversial replies to criticism which has appeared in these pages, we are open to correction or fair exception in matters of verifiable fact. Mr. Grigsby's complaint (except perhaps the third paragraph, to which we give the benefit of the doubt) comes within the latter description, and we therefore print it, and, with Mr. Grigsby, leave the matter to the judgment of our readers. If learned and impartial persons, on comparison of Mr. Grigsby's vindication with the full context of the passages referred to, are satisfied that he has not been treated with substantial justice, we shall be content to stand corrected.

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### NOTES.

A RECENT decision of the High Court of Bombay (April 16, 1885) enables us to assist at the death of the *Patria potestas* in India. Jug-Mohundas Munguldas sued his father, Sir Munguldas Nathooboy, for a share of the ancestral property of the family in his father's hands. The Court held, in supposed opposition to a *dictum* of Sir H. S. Maine in *Early Law and Custom* (p. 122), that the son could legally enforce the right which he claimed, though his doing so would be *contra bonos mores*. No doubt, when the *patria potestas* was in its early vigour, the dictates of law and morality coincided, which was probably all that Sir H. S. Maine meant. The father also set up a special custom in his caste forbidding partition. The evidence, however, only made out that a great number of people in the caste had never sought for a partition. As this only showed that they were more moral than the lawyers, the Court held that it did not establish a custom overriding the law.

Another curious point was also decided in the same case. Where a son succeeds as heir to the self-acquired property of his father, he takes it as ancestral property and subject to the joint rights of his own sons, notably to the right of partition. Does the same rule apply where he takes the property as devisee under his father's will? A note of Hargrave and Butler was quoted as laying down that 'whenever a devise gives to the heir the same estate in quality as he would have by descent, he shall take by the latter, which is the title most favoured by the law.' The Court held that this rule did not favour the claim, since an estate by devise differed from one by descent in this very quality, that the bequest was intended for the sole and exclusive use of the devisee, and therefore shut out all rights that would otherwise arise by implication of law.

J. D. M.

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The case of *Durham v. Durham*, 10 P. D. 80, and the two cases subjoined to it in the report cannot be said to establish any new rule of law. If a party alleges the insanity of another, the burden of proof lies on him to prove his allegation: this is obvious enough. If it can be proved that a person who has gone through the form of marriage was incapable of understanding the nature of the contract, the marriage is a nullity: this has never been doubted in modern times. There are however two ob-

servations of Lord Penzance in *Hancock v. Peaty* which seem to limit the practical application of the rule. 1. If a man marries a woman, knowing her mind to be affected, he may perhaps be estopped from asking to have the marriage annulled on the ground of insanity. 2. If a woman is insane at the time of her marriage and afterwards recovers, the Court may perhaps refuse to annul the marriage, unless on her application. These observations were made *obiter*, but they are worth noting.

The cases cited on the trial of *Durham v. Durham* are for the most part cases of fraud, which are not exactly in point. Thus in the case of Lord Portsmouth, who was suddenly persuaded to marry his solicitor's daughter, Sir J. Nicholl stated, as the ground of his judgment, that 'considerable weakness of mind, circumvented by proportionate fraud, will vitiate the fact of marriage;' and his remark that the union in question was 'meretricious, not matrimonial,' would not have been made in a case of innocent misfortune.

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Now that *The Attorney-General v. Bradlaugh*, 14 Q. B. D. (C. A.) 667, is laid before the public in an authorised form, every one would do well to note what are the three main points which are determined by the verdict of the jury taken together with the judgment of the Court of Appeal. They are these. *First*, Mr. Bradlaugh did not as a matter of fact take the Parliamentary oath in the manner prescribed by law, and therefore became liable to penalties for having voted without having taken it. On this point every man of common sense will hold the decision to be right. Mr. Bradlaugh's attempts to take the oath after his own manner were as injudicious as they were unseemly, and do not raise one's opinion either of his judgment or of his legal knowledge. *Secondly*, Mr. Bradlaugh or any Member of Parliament who does not believe in the existence of a Supreme Being, and upon whom an oath has no binding effect as an oath, but only as a solemn promise, is owing to his want of religious belief incapable by law of making and subscribing the Oath of Allegiance within the meaning of the Parliamentary Oaths Act, 1866; and any such person who takes his seat and votes as a Member of Parliament, although he has gone through the form of making and subscribing the oath appointed by statute, is liable to a penalty of £500 for every vote he gives, and (though the Court does not dwell upon this) his seat is vacated. This statement of the law, or rather its consequences, will we suspect startle more than one Member of Parliament. *Thirdly*, any evidence which is otherwise admissible as proof of a defendant's state of mind may be laid before a jury in an action for penalties against a Member of Parliament, as showing that by reason of disbelief in the existence of a Supreme Being he was incapable of taking the Parliamentary oath. This proposition will commend itself to lawyers as a technically necessary deduction from the second.

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Most men think a good deal more of conclusions than of premises, and should the House of Lords agree with the whole of the doctrine laid down by the Court of Appeal, a good many orthodox believers will feel surprise and alarm at the effect produced by the last of the *Bradlaugh Cases*. No known or suspected Atheist or Agnostic can henceforth safely sit and vote as a Member of Parliament. He will, in the first place, feel the painful consciousness that he holds his seat in defiance of the law and under false pretences. There are many men of tender conscience who will feel such a false

position intolerable. Such an Agnostic, again, will never be safe from ruin. Each vote is a new offence. He may not be actually sued for penalties, but he is liable to an information. Moreover (and this is of primary consequence), his safety may depend upon the varying chances of party warfare. Suppose that the next election returns an ardent Conservative majority; there will be nothing to prevent the House of Commons, or rather the Government which represents the House, from at once bringing actions for penalties against every suspected Atheist for having voted in this Parliament without making and subscribing the Oath of Allegiance. Common fairness makes such a course of action, it will be said, impossible. Equity, we reply, is not an invariable characteristic of political partisanship. A law which is open to gross abuse is a law which requires amendment.

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*Edmunds v. Wallingford*, 14 Q. B. D. (C. A.), 811, is noteworthy on two accounts. It exhibits a tendency which appears to be very marked among modern judges, to extend rights of indemnity, or in general terms to increase the number of obligations *quasi ex contractu* known to the law of England. It also throws doubts on the correctness of the decision in *England v. Marsden*, L. R., 1 C. P. 529, a case which we suspect intelligent readers have often thought unsatisfactory.

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*Fearon v. Aylesford*, 14 Q. B. D. (C. A.), is noticeable rather from the singular circumstances of the case than from any general principle which it establishes. It illustrates however the extreme difficulty of defining the meaning of such terms as 'moderation,' and persons who like to amuse themselves with the casuistry of law may find a good deal of interest in considering the suggestion of Lindley L.J., that it may be possible to 'molest' without 'intending to molest.'

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*Ballard v. Tomlinson*, 29 Ch. D. (C. A.) 117, settles an interesting question as to liability for the use of his land by a landowner in such a way as to cause a nuisance to an adjoining owner.

The plaintiff and defendant owned respectively two properties separated only by a public highway. On each property was a well, and the water which supplied the two wells percolated through the soil from the defendant's well to the plaintiff's.

The defendant ceased to use his well for water supply and turned it into a receptacle for the sewage arising from the use of his buildings, and the sewage thus introduced contaminated the plaintiff's well.

It was contended that the plaintiff had no property in the water percolating through the soil, and that inasmuch as the defendant was entitled to take so much as would drain the plaintiff's well and deprive the plaintiff of all enjoyment of the percolating water (*Chasemore v. Richards*, 7 H. L. C. 349), he was therefore entitled to deal with his well as he pleased.

It was further contended that since the plaintiff was injured by his own act in using powerful appliances to get the water, the defendant could not be held liable as one who brought a dangerous thing on to his land, for but for the plaintiff's act it would have stopped there, or at any rate would not have been a nuisance to the plaintiff.

But the Court held that, in the words of Lindley L.J., 'the right to foul

water is not the same thing as the right to get it, and does not depend on the same principles. *Prima facie* every man has a right to get from his own land water which is naturally found there, but it frequently happens that he cannot do this without diminishing his neighbour's supply. In such a case the neighbour must submit to the inconvenience. But *prima facie* no man has a right to use his own land in such a way as to be a nuisance to his neighbour.

There was abundant authority for the proposition that 'one man has no right to foul water which another has a right to get: and if he has a right to get it, the fact that by pumping he draws it partly from the defendant's land is immaterial.'

The case is an extension of the doctrine of liability for bringing dangerous things on to one's property. The injury done by the sewage was the contamination of water in which the plaintiff had no property, though he had a right to appropriate it if he could. And his appropriation was effected by powerful artificial appliances. The defendant was entitled to use such a pump as would have exhausted all the water percolating through the soil, but he might not use his well as a cesspool to the detriment of his neighbours. He might have rendered his neighbour's well useless, he was not permitted to make it unwholesome.

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In *Edmonds v. Robinson*, 29 Ch. D. 170, the Court refused to entertain an application by a partner for a return of a proportionate part of the premium he had paid on entering the partnership, the application being made after judgment for dissolution and an account had been obtained, and no such claim having been made at the hearing. No light is thrown by the case on the question, still somewhat obscure, how far the Court is bound by any settled principles in ordering a part of the premium to be returned where this kind of relief is sought in due course.

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*Bidder v. Bridges* (Kay J. and C. A.), 29 Ch. D. 29, is a report on an interlocutory question arising in a case of rights of common, or rights *ejusdem generis*, of which a good deal more will be heard. In the course of the argument before the Court of Appeal the parties agreed to refer it to the Court (or rather the members of the Court) as arbitrators to settle the interrogatories in dispute. This leaves it a rather nice question how much authority attaches to the decision appealed from.

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Do politicians ever study the *Law Reports*? The language used by the advocates no less than by the opponents of Imperial Federation suggests that many so-called statesmen have very loose ideas as to the legal position of the colonies. *Harris v. Davies*, 10 App. Cas. 279, and *Powell v. The Apollo Candle Company*, 10 App. Cas. 282, have nothing in them to surprise lawyers. But they illustrate two points well deserving the attention of Members of Parliament. *First*. The Privy Council, and indeed any court throughout the British dominions, may treat as invalid any law passed by a colonial legislature which is *ultra vires*. *Secondly*. The tendency of the Privy Council is markedly to extend rather than limit the authority of colonial legislative bodies. We can hardly doubt that the Supreme Court of the United States would have pronounced unconstitutional a law passed by any State of the Union like the Act of the New South Wales Parliament

which was held valid by the Privy Council in *Powell v. The Apollo Candle Company*. American Courts, accustomed to a Federal Constitution, regard the authority of any legislature as presumably limited. The Privy Council, accustomed to the sovereignty of the British Parliament, tends to look upon colonial legislatures as, so to speak, miniature Parliaments endowed with unrestricted authority within a restricted area.

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*The Metropolitan Bank v. Pooley*, 10 App. Cas. 210, illustrates a tendency on the part of plaintiffs to stretch very unfairly the sphere of actions of the nature of proceedings for malicious prosecution, and to revive the more or less obsolete rules as to maintenance. The case also happily illustrates the vigour with which the House of Lords will check attempts to make an unfair use of legal remedies. It is very well that the Courts should be reminded that it is their right and duty to dismiss summarily actions which are frivolous and vexatious.

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A glance at the reports of the Q. B. D. for June certainly suggests the idea that the time of the Court is mainly taken up with decisions on points of practice and on the interpretation of statutes. We do not say that this is necessarily an evil, but it is impossible not to think that some method might be resorted to under which questions of practice might become of less constant occurrence. It is even more certain that the drafting of statutes admits of immense improvement; and, further, that no improvement in this matter will take place until Parliament ceases to act on the absurd fiction that six hundred and odd gentlemen can by their combined efforts compose an Act of Parliament. Our Parliamentary representatives try to make laws on a plan which none but a lunatic would adopt for writing a letter. The vanity of M.P.'s is the main but also the insurmountable obstacle to the success of any scheme for codifying the law.

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*Ex parte Salaman*, 14 Q. B. D. 936, should be studied by everybody interested in the success of the Bankruptcy Act. It holds out hopes that the Courts may place a considerable check on rash and hazardous speculations.

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If any of our readers wishes to see some much stronger language about the printing and arrangement of the Law Reports than Lord Justice Lindley has used—or we should care to have seen used at all in this *Review*—he may turn to p. 311 of the June number of the Scottish 'Journal of Jurisprudence.'

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## CONTENTS OF EXCHANGES.

(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers).

*The Journal of Jurisprudence and Scottish Law Magazine.* Vol. 39. Nos. 340-342, for April, May, and June, 1885. Edinburgh: T. & T. Clark.

No. 340. Technical objections and escapes from Justice—Can two Casualties be demanded at the same time in respect of the same holding?—The West African Conference—Proposed Mercantile Code—Notes, Reviews, etc.

No. 341. Scotland and the National Government—Delivery of Bills of Lading—The Court of Venus—Notes, etc.

No. 342. Technical Objections and Escapes from Justice—Deer—Origin and History of the High Court of Justiciary, No. VI—Reviews, Notes, etc.

*Canada Law Journal.* Vol. XXI. 1885. Toronto: C. Blackett Robinson.

No. 7, April 1. English Bills of Exchange Act—Sir G. Cartier and the Civil Code—Recent English Decisions—Notes of Canadian Cases. Among editorial notes, a suggestion that the Queen's writ should run throughout the Empire.

No. 8, April 15. Administration of Justice Act—Our English Letter—Recent English Decisions—Notes of Cases, English and Canadian, etc. English letter (incompleteness of 'fusion of law and equity': judges talk too much).

No. 9, May 1. Contempt of Court—Legislation in Ontario—Recent English Decisions—Notes of Cases, English and Canadian, etc.

No. 10, May 15. Legislative Statistics—Our English Letter—The Temple of Justice in England—Shakespeare as a Lawyer—Reports, Notes of Canadian Cases, etc.

*The Canadian Law Times.* Vol. V, Nos. 4 and 5, April and May, 1885. Toronto: Carswell & Co.

No. 4. Factors and the Factors Acts—Editorial Reviews—Notes of Cases, etc.

No. 5. Ontario Legislation, 1885—Editorial Review—Review of Exchanges, Notes, etc.

*The Manitoba Law Journal.* Vol. II. Winnipeg: R. D. Richardson. 1885.

No. 4, April. Injunctions to restrain Libel and Slander—Convincing the Court—*Foakes v. Beer*—Reports of Cases.

No. 5, May. Distribution of Assets—Railway Carriers or Warehousemen—The Seventeenth Section of the Statute of Frauds (reprinted from this REVIEW: the profession in Manitoba are very welcome, but it would not have been difficult to ask for our consent)—Editor's Notes—Reports of Cases.

*The American Law Record.* Vol. XIII, No. 11, May, 1885. Cincinnati: Bloch Publishing Co.

Reports in Supreme Courts, U. S. and Ohio—Current Items—Book Notices—Digest.



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# THE LAW QUARTERLY REVIEW.

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No. IV. October, 1885.

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## NOTES.

### I. STOPPAGE IN TRANSITU.

*Kendal v. Marshall*, 11 Q. B. D. 356. *Ex parte Miles*, 15 Q. B. D. 39.  
*Davison v. Collison*, 'Times,' March 14, 1885.

THE above cases seem sufficient to enable one to ascertain the rules of law with reference to some questions bearing on stoppage in transitu which have hitherto involved some difficulty or doubt.

In *Ex parte Miles*, the judgment of the Master of the Rolls is founded on the proposition laid down by Lord Ellenborough in *Dixon v. Baldwin*<sup>1</sup>, that where goods have been sent by the vendor to the agent of the purchaser who has to receive instructions from his principal for the purpose of forwarding them, without which orders they would continue stationary, the transit is at an end when the goods reach such agent's hands. The same proposition, in somewhat different terms, is enunciated by Grove J. in *Davison v. Collison*: 'The transit ends where the goods have reached the hands of an agent who requires the authority of the purchaser to send them on.'

This view of the law does not however appear to be perfectly satisfactory. It seems to have been thought, at one time, that the transit was only at an end, if at the time the goods reached the agent he was waiting for orders to send them on: but now it is established that it is immaterial whether the orders to forward are given before or after the delivery of the goods to the agent. Since, then, the purchaser's agent cannot in any case be entitled to forward the goods without the authority of his principal, it follows that the proposition above referred to does not afford a really satisfactory test. I think, however, the following three rules reconcile all the

<sup>1</sup> 5 East, 175.

cases which have been correctly decided, and are sufficient to solve the questions which present themselves on this branch of the law relating to stoppage in transitu :

1. Where goods are sold 'free on board,' the transit is not at an end when the goods have been shipped, but continues until the termination of the voyage: and the goods may be stopped at any time before such termination although the vendor may not have known, at the time of the sale, for what port they were destined. (See *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560; *Berndtson v. Strang*, L. R., 4 Eq. 481, 3 Ch. 588.)

In the case supposed the goods are, in fact, placed by the vendor in the hands of the carrier, who is not the agent or servant of the purchaser, but an intermediary between him and the vendor.

2. Where by the agreement between the vendor and purchaser the former is to send the goods to a place *A*, and for that purpose they have to be placed in the hands of agents for the purpose of being transmitted to *A*, the transit is not at an end until the goods arrive there, subject however to the purchaser's power of intercepting them, by actually taking possession at some intermediate place. And this holds good, although the agents are persons appointed by the purchaser and bound to obey his orders.

3. Where, according to the contract of sale, the vendor is to send the goods to an agent of the purchaser at *B*, the transit is at an end as soon as such agent receives them, although the vendor is informed that they are destined for another place, and are to be forwarded there by that agent, and although the latter may employ the seller's servant or agent to forward them to their ultimate destination.

## II. ON THE AMENDMENT OF OUR LEGAL PROCEDURE.

There are a large number of actions in which money may be paid into Court for the purpose of satisfying the plaintiff's claim, and it is impossible for the defendant to know the exact sum which may be ultimately found to be sufficient for that purpose. Cases of salvage and personal injuries, for instance, give rise to actions of this character. According to our present system, if the sum paid into Court is less than that which is found to be due to the plaintiff, the defendant has, as a rule, to pay all the costs of the action, although the plaintiff's claim may have been exorbitant or excessive. There seems to be an easy mode of remedying the injustice frequently resulting from this rule of practice. The plaintiff should be obliged, after the defendant has paid into Court, to state exactly what sum he, the plaintiff, claims. The defendant should then be at liberty to increase the amount of his tender, the plaintiff being in like

manner allowed to diminish his claim, and this operation should be permitted to continue until notice of trial is given.

Unless some good reason to the contrary is shown, the costs of the action or defence should be awarded to whichever party has named the sum nearest in amount to that actually found to be due. In cases tried before a jury the same process might be adopted, care however being taken to prevent the sums named by the parties from being communicated to the jury before they have given their verdict.

I think there is no doubt whatever that if such a procedure were adopted, much expensive litigation would be avoided, as both parties would find it to their interest to endeavour, by modifying their estimate of the claim, to arrive at a reasonable compromise, and the costs, in case a trial did take place, would fall upon the party who had occasioned the expense by refusing the offer which his opponent made to him.

ARTHUR COHEN.

## ON LAND TENURE IN SCOTLAND AND ENGLAND.

## II.

IN the Scotland of David I. and the Alexanders, authentic records and genuine tradition combine to afford glimpses of a picture of material prosperity enjoyed under a strong government and in times of comparative peace. Manors of a type identical with that prevailing throughout England are found widely established; and in both countries alike are found underlying the manorial system the traits of a more archaic community of plough cultivators. The people are of various, and still distinct, races. The superior landlords are of one class, Normans with an infusion of English blood; and kindred with the ruling class in England. But the disadvantages of a military and land-endowed caste are mitigated by the sway of a Sovereign able and willing to protect the rights of the peasant and maintain the cause of the poor. The effect of the close relation between the ruling classes in the two countries is seen in the identity in their main features, of the systems of administration and of land tenure in each.

These harmonious relations are broken by the imperial design of Edward, its temporary achievement and ultimate failure. From the War of Independence the people of Scotland emerged as a nation, in which heterogeneous elements had been welded together under a common pressure. The barons who held estates in both countries have had to elect; and those who chose the fortunes of the Bruce became more Scotch than the Scots, or Irish Celts, from whom their land received its name. The faithful leaders are rewarded with lands resumed from owners who have virtually forfeited them, by residence in England *contra fidem et pacem regis*. The humbler classes are no less profoundly and permanently affected by the movement. A peasantry who had effectually learned and practised the lesson, first taught by Wallace, how spearmen on foot might baffle the attack of the hitherto invincible men-at-arms, were in a fair way towards the emancipation more tardily, and by the aid of the Black Death, accomplished in England. The constant warfare for nearly a hundred years afforded employment for a free peasantry; and in the latter part of the fourteenth century the writ *de nativo fugitivo* had become virtually obsolete in Scotland<sup>1</sup>.

<sup>1</sup> The last claim of neyfiship or serfdom proved in a Scotch Court was in 1364. Innes, *Scotch Legal Antiquities*, p. 159.

The condition of the Scotch peasantry about this period is brought into picturesque relief by an incident duly noted in the chronicles as well as marked on the statute-book of the time. In the year 1385, when a close alliance subsisted between Scotland and France, an aid was sent from the latter country consisting of one thousand complete stand of armour, fifty thousand gold pieces, and two thousand men, one thousand of them being mounted men-at-arms. The money and the armour were esteemed a god-send; the men were superfluous and embarrassing. They were kept employed, however, and entertained in such fashion as the resources of a poor country would admit; but the situation became strained between hosts and guests, and the visitors returned not without heartburnings on both sides. Of the causes of complaint on the side of the foreigners the most grievous was the rudeness of the peasantry, who resented the carrying off of a cow, and claimed compensation for crops ridden over. The grievance was aggravated by the action of the Scotch Parliament, who laid down stringent regulations for the conduct of the strangers, and for settling their disputes with the rustics. The contrast is emphasized by the account given by Froissart of the home-return of these ill-used knights, who on arrival in their own country were so poor, that they could only remount themselves by seizing the labouring horses wherever they found them in the fields<sup>1</sup>.

From this digression I revert to the epoch marked by the War of Independence. It is then that the systems of land tenure in England and Scotland begin to diverge. The result is one of the paradoxes of legal history. In Scotland, where the people resisted to the death the English claim of feudal superiority, the chains of feudal tenure, in its minutest incidents, became rivetted on every parcel of land; in England, the rules of feudal tenure, except as grounding a presumption for the law of intestate succession, have long ceased to be of more than antiquarian interest.

In England the divergence is strongly marked in the legislation under Edward I. Of the enactments by which, in this reign, nearly the whole field of English law was traversed, perhaps the most far-reaching in its results was the chapter of the Statute of Westminster<sup>2</sup>; whereby the period within which the plaintiff in a writ of right should declare the seisin of his ancestor, was limited to the time of Richard I., and shorter periods of limitation were fixed in regard to certain other writs. The principle was not indeed new; and the Statute only followed the precedent of other enactments, the last of which, in the reign of Henry III, had

<sup>1</sup> Burton, *Hist. of Scotland*, vol. iii. p. 54; *Act. Parl. (Robert II.)* vol. i. p. 190.

<sup>2</sup> 3 Ed. I. c. 39.

brought down the period of limitation from the time of Henry I. to that of Henry II. But this Statute of Westminster under Edward I. is regarded as the foundation of the modern law of prescription, as based on possession, in England. It has been the charter of many a small freeholder, of the class from whom Oliver Cromwell's Ironsides were recruited. Two other Acts of this reign may be mentioned as marks in the history of tenure and title in England. These are commonly known as the Statute *De Donis*<sup>1</sup> and the Statute *Quia Emptores*<sup>2</sup>.

The Statute *De Donis* is important rather as affecting the forms of conveyance and title than the substantial incidents of tenure. It appears to have been passed by the influence of the great landowners who desired the privilege of imposing their own will upon the future devolution of their estates. In the earlier stages of feudal law the tenure was personal to the holder; but it became usual for the superior, on certain terms, to consent to the transmission or alienation of the holding; and gradually the capacity to transmit the property to an heir, or to alienate the estate by deed, became generally recognised. A favourite form of grant appears to have been to a man and his wife and the heirs of the marriage, or to a man and the heirs of his body. Suppose the grant made by A., to B. and the heirs of his body. The words 'heirs of his body' were construed as words of *limitation*, that is to say, limiting the class of persons who were to take in the character of *heirs*. Now, as B.'s issue who would take under this gift took as a species of heirs, i.e., as deriving their right from B., it logically followed that B., by his act of alienation, could defeat the gift to them; and the power of alienation was further so far favoured by law, that B., being in possession of the estate and having issue, could not only disinherit his issue, but defeat the reversion to A., or any remainder which A. might have created by an ulterior gift. From A.'s point of view, however, this was esteemed a grievance. A. meant, or thought he meant, that the estate should at B.'s death go to his son if he had one, and had no idea that he was putting the estate entirely in B.'s power. To remedy this, the Statute declared that the will of the donor, A., according to the form of the gift manifestly expressed, should be observed; so that B. should have no power to alienate the land, but it should remain to the issue to whom it was given after B.'s death, or revert to A. or his heirs if issue fail.

This attempt to defeat a principle of law which, through its general convenience, had grown into popular favour was, naturally,

<sup>1</sup> 13 Ed. I. Stat. I. (Statute of Westminster the Second), ch. I.

<sup>2</sup> 18 Ed. I. Stat. I. (Statute of Westminster the Third).

unsuccessful. Some of the loop-holes are, indeed, obvious. There is nothing to alter the received construction of the word 'heirs,' as persons who take *by way of representation* through B.; or to show that such 'heirs' shall not be bound by B.'s personal obligation, such for instance as an obligation to warrant the title of a purchaser. Further, although B. is expressly placed under disability in regard to alienation, it is not said that any default or omission of his, or judgment suffered by him, shall have no legal effect. The ingenuity of lawyers, aided by the disposition of judges to maintain the alienability of estates, succeeded in building up a fabric—the curious system of fines and recoveries—whereby B., who was said to have an *estate tail*, had practically all the power which he would have had independently of the Statute, and indeed the full power to alienate whether he had ever had issue of his own or not.

The total result, ultimately, of the Statute *De Donis* was to create an incumbrance on the *forms* of English conveyancing; and as there never was any similar Statute in Scotland, the forms of conveyance remained in this respect so much the simpler. It would perhaps be difficult, from purely Scotch sources, to find what was the effect given in early times to a 'simple destination,' i.e., where A. disposes the estate to B. and the heirs of his body, &c.; but, as the effect of such a destination at the present time is very similar to that described in the Statute *De Donis*, it may be fairly inferred that, from an early period in Scotch law, such a destination gave to B., when he acquired the estate in possession, the full power to 'alter the destination,' or dispose of the estate free from the ulterior limitations. If B. dies without altering the limitations, they take effect according to the terms of the original destination. Whether a disposition in favour of B., without mention of heirs, is to be construed as a gift for life only, or as a gift in fee, seems to have been, so late as the time of Sir Thomas Craig, who inclined to the English view, a questionable point. In modern Scotch law, such a gift is always construed as a disposition of the fee. It was never in Scotland (at least in modern times) considered essential, in order that B., being seised to him and the heirs of his body, should be able to alienate, that he should have or have had issue.

The attempt by Statute to create unalterable entails was in Scotland postponed to a much later period, and, when made, it was much more successful. In the meantime, the same object as that aimed at by the framers of the English Statute *De Donis*, had exercised the ingenuity of the lawyers of the great landowners; and the form of a deed of entail was gradually devised, which, after disposing the lands to the grantee and heirs in the order of succession desired, contained clauses expressly prohibiting the



successive grantees from (1) altering the order of succession, (2) selling or alienating, (3) contracting debt so that the estates might become liable to be adjudged to the creditors. Declaratory clauses were added, to the effect that all such acts should be null and void, and that on contravention of any of the prohibitions, the right of the contravenor should *ipso facto* be determined, and the succession devolve on the next heir. Doubts were entertained, as well they might be, whether these elaborate declarations in a private deed could have any effect against the general policy of the law in favour of freedom of alienation; but, ultimately, the landowners of the day had their wish, and by a Statute of the year 1685 it was enacted that, under certain conditions of publicity, deeds of entail which were properly 'fenced' by clauses of the above-mentioned nature, should receive effect. Under this statutory sanction the deed so elaborated became really operative. The limitations carefully framed for perpetuity received effect; and for more than a century and a half, until the 'Rutherford Act' of 1848, the landed gentry of Scotland enjoyed the distinction of a system of entails with an indefeasibility rivalling the Act of Union of the Medes and Persians.

Reverting to the legislation of Edward I., a very important Statute in the history of land tenure in England is that commonly known as *Quia Emptores* (18 Ed. I. stat. I. cap. I.). This Statute doubtless owed its origin to the influence of the large landowners, the same class as those who desired the power of effectually entailing their lands. The grievance complained of is, that purchasers of land have taken their tenements to be held in fee of their vendors, and not of the chief lords of the fees, whereby the chief lords have lost their escheats, marriages, and wardships. It was therefore enacted (by the first chapter of this Statute) that thenceforth it should be lawful to every freeman to sell his lands, but only on the terms, 'that the feoffee should hold them of the chief lord of the same fee, by such service or custom as his feoffee held before.' By the second chapter of the same Statute it was enacted, that if part only of the land was sold, the services should be apportioned, and, by the third chapter, that no feoffment should be made of lands held in fee simple to be held in mortmain.

Though passed by the influence of the same class of landowners, the Statute *Quia Emptores* had a very different fate from the Statute *De Donis*. The change introduced was consonant to public convenience. The multiplication of feudal tenures, with all their incidents of aids, reliefs, marriage, and wardship, was a growing evil, to which the Statute interposed a salutary check. It was also for the public benefit that the power of alienation should, once for

all, be freed from a restraint by the lord. At this point the whole system of conveyancing in Scotland parts company with the English system. In Scotland the consent of the superior to the alienation remained essential. It became customary, and in time obligatory, to give this consent upon payment of a sum fixed by a custom (confirmed by Statute) at a year's value of the lands. This liability to the 'composition on entry' remained a burden on the vassal's right; and, unless taxed (or fixed by agreement in the original charter) at a time when the value of the lands was relatively small, is a very serious burden. On the other hand, the vassal in Scotland retained the option<sup>1</sup>, instead of alienating out and out, of creating a subordinate tenure in fee to be held of himself; and a perpetual tenure thus created is still the favourite mode of holding land for building purposes. It has the advantage, over the system of building leases prevailing in England, of preventing the accumulation of house property of enormous value in the same hands, and tends to widen the class of persons having permanent rights in the nature of immoveable property.

The legislative activity employed in England during the time of Edward I. has no counterpart in Scotch legal history. For the hundred years which followed the temporary subjection to Edward, the struggle for preservation of national existence leaves no time or inclination for legislation upon general questions of private right. It is enough that no right to land shall be recognised in those who live, no right transmitted by those who die otherwise than at the peace and faith of the king.

The constitution of Parliament in Scotland has never been favourable to legislation in the popular interest. Of Parliament, as an assembly in which there is any effective popular representation, the history in Scotland is a very brief one. In the notable Parliament of Cambuskenneth in 1326, we find, for the first time, all the estates of the realm, including the burgesses, in full Parliament assembled. This was the Parliament summoned by Robert Bruce to ask for a revenue to meet the expenses of the great war. The King acknowledged that, after spending his patrimony, he has only been able to sustain the burdens of the state by grievous and oppressive exactions, and asks the aid of the estates to find some

<sup>1</sup> The existence of this option led to some of the curious subtleties of Scotch conveyancing which existed within present memory. While the sub-tenure avoided the necessity of an immediate payment of composition, there might be also an advantage in holding directly of the superior; and the ingenuity of lawyers was much exercised in devising means whereby the number of entries payable to the superior should be minimised. Hence the mysteries of 'midsuperiority' and '*a me vel de me* holding,' by which a Scotch lawyer of the last generation might have maintained the credit of his country if challenged to produce anything equal to the English *recovery*, wherein the tenant to the *praecipe* 'vouched to warranty the said B, who on being vouched, vouched to warranty the common vouches.'

*modus vivendi* for the future. The estates, earls, barons, burgesses, and freehold tenants (*libere tenentes*), whether holding mediately or immediately from the King, confirm the truth of the narrative, and acknowledge the justice of the requirement. They accordingly grant the King the tenth penny of revenue according to the 'old extent' made in the time of King Alexander the Third. The King, on the other hand, promises to make no more extraordinary exactions; and the concession of revenue is strictly limited to the lifetime of the King.

The constitution of Parliament has now become fixed, and the representation of the burgesses as well as the freehold tenants is an essential element in all subsequent Parliaments. It is not very long, however, before a radical change is made in the practice of the Parliament, which ultimately results in the delegation to a small Committee of the legislative functions of the body. The process begins in the year 1367, and in less than sixty years from that time, 'the Lords of the Articles' have become a Standing Committee to whom the entire work of legislation is delegated, the Estates formally meeting, from time to time, to pass in block the measures framed by the Committee. The result is an extremely neat and perspicuous body of Statute law, but one in which we need hardly look for the amendment, in the popular interest, of the general law relating to private rights.

Not less remarkable is the contract between the two countries, in the history of law as determined by judicial decision. The English Year Books furnish a unique record of a process whereby private right, no less than personal freedom, 'broadens slowly down from precedent to precedent.' In Scotland there is no similar record, and the chain of judicial decision is a broken one. The troubles ensuing upon the death (in 1329) of Robert Bruce, inaugurate a reign of 'unlaw' which lasted for near a century. Any attempt to trace, during this period, the history of Scotch legal institutions, is like groping in a darkness that may be felt. Towards the end of the fourteenth century, the state of misrule had become so intolerable, that the Estates (in 1398) took the matter in hand, and introduced some provisions for making the great officers of government responsible. It was not, however, until after the return, in 1824, of James I. of Scotland from captivity in England, that a serious attempt was made to reform the administration of justice. This monarch also appears to have entertained a project of legislation in the interest of the cultivators of the land; and in 1429—five years after his return—he obtained, doubtless with this object, a temporary Act for the suspension of arbitrary evictions. The Act, expressed in the brief and pithy language of

the legislation of the time, is as follows<sup>1</sup>:—*Item dominus Rex obtinuit per modum Requestus a prelatibus et baronibus quod non removerentur pro anno futuro colonos nec husbandos a terris suis eisdem alias<sup>2</sup> assedatis nisi domini illarum terrarum illas terras capiant ad usus suos proprios.* No sequel to this temporary Act is, however, to be found in this reign; and it may be surmised either that, on inquiry, no customs were ascertained to exist on which any rights in favour of the cultivators could be founded, or that the opposition encountered was too formidable for effective legislation. It was not until 1449—twenty years later and in the subsequent reign—that an Act was passed giving security of tenure to lessees under contracts in writing. This Act, to which I shall revert when I come to the important subject of leases or ‘tacks,’ still stands on the Statute-book as the sole provision of Scotch law to modify the absolute ownership of the *dominus* feudally seised of the land.

The only impression possible to form from the scanty materials relating to Scotch law at the close of the fourteenth and in the early part of the fifteenth century is, that any genuine Scotch customs relating to the occupation and humbler tenures of land had not only ceased to exist, but had lost the capacity of being revived. The bad feeling amongst the feudal magnates which led to the violent death (in 1436) of James I. has been ascribed<sup>3</sup>, amongst other causes, to the legal and parliamentary practices brought with him from England, favouring the protection of the rights of the humble classes, and tending to check the abuses of feudal power. It seems not unlikely that his efforts in the direction of specific legislation for the benefit of the cultivators contributed to intensify this feeling, and to inspire and encourage the authors of a tragedy which here stands out in glaring colours from an obscure page of history.

A modern parallel to the condition of land tenure in Scotland at the time of the return of James I. (in 1424) is furnished by the condition of Oudh (in India) just before its annexation by Lord Dalhousie in 1856. The misrule of the country under the Nawab, which excused, and perhaps in this instance, justified the measure of annexation, was probably not unlike that which led to the action of the Scotch Estates in 1398. The position of the great talookdars in Oudh corresponded almost exactly with that of the great feudal landowners of this period in Scotland; and the difficulties which surrounded James I. in his endeavours to benefit

<sup>1</sup> Act. Parl. (Thomson's), vol. ii. p. 17.

<sup>2</sup> The words here are written *eisdem* s.t.s. I am indebted to Mr. Thomas Dickson, of the Historical Department of the Register House, for the explanation that they are to read ‘*eis alias*’—*alias* being used as equivalent to ‘*præ*.’

<sup>3</sup> Burton, Hist. of Scotland, iii. 116.

the humbler classes of his subjects may perhaps be fairly realized by a perusal of Mr. Bosworth Smith's description<sup>1</sup> of the circumstances which thwarted Lord Lawrence in his efforts to find a *locus standi* for the cultivators and humble classes of tenure-holders in Oudh. It was ultimately found on inquiry that the great talookdars were the only persons who, in recent times, could be recognised as having enjoyed any kind of property in the land; and that all subordinate rights had been, in effect, swept away by the acts of violence which had been the order of the day under the Nawabs. In Oudh the process had been simplified by Lord Canning's policy after the Mutiny, which made *tabula rasa* by confiscation and regrant of the land to the great talookdars. The same result was not less effectually achieved in Scotland by the course of events, which gradually eliminated all customary rights, and established the absolute dominum of the feudal grantees (mediate or immediate) of the Crown.

In the absence of either controlling legislation or ruling precedent, the field had remained open for the ingenuity and industry of lawyers to build up a fabric which might at once fortify the rights of their employers, and provide for themselves occupation in keeping the fabric in repair. I have already shown that the feudal lawyer must have closely followed on the steps of the Norman adventurers and their territorial acquisitions. His craft was doubtless exercised in the elaborate pleadings of the various claimants for the Crown of Scotland submitted to the arbitration of Edward. His hand is seen in the charters granted by Robert I.; and he doubtless found employment from the disinherited barons who, with Edward Balliol, had a brief tenure of power during the minority of David II. Henceforth he continues to exert a subtle influence which flourishes in proportion to the want of a strong and popular legislative authority. Besides the traditions received from his predecessors in the craft, he was probably furnished with a knowledge of some scraps of Justinian's Code and Digest; but his chief oracles were the *Libri Feudorum*, compiled in North Italy under the direction of Barbarossa, and appended, as a sort of apocrypha, to the canonical books of the Roman Law.

Of the books of law considered to be of genuine Scotch origin, it would have been difficult for a lawyer of the fifteenth century to give any intelligible account. Collections of laws and styles there were, regarded as having some kind of ill-defined authority. Of these the most celebrated is the '*Regiam Majestatem*,' long thought

<sup>1</sup> *Life of Lord Lawrence*, vol. ii. p. 360. I am informed by Lord Ripon that the *status* of the cultivators in Oudh came under the consideration of the Government of India while he was at its head, but that no final decision had been come to when he left India.

to have been a genuine ancient Scottish law-book, until a tardy criticism showed it to be a mere transcript of Glanville's Treatise 'De legibus Angliæ' with some variations and interpolations. It is, nevertheless, historically valuable as showing the approximation as well as some of the differences, between the legal systems (in the early part of the thirteenth century) of the two countries.

In the prevailing ignorance as to the sources of law, and the readiness with which anything purporting to be a written book of the law was accepted as authoritative, it is not surprising that a clumsy forgery should have escaped ready and certain detection. To the latter part of the fourteenth century may be attributed the so-called 'laws of Malcolm M<sup>c</sup>Kenneth,' purporting to belong to the date 1004-1034. According to the statement of the opening chapter of these laws, the whole land of the country, assumed to have been in the *plenum dominum* of the King, was granted away to his subjects. It is, of course, unnecessary in the present day to prove that such a statement could not possibly have been made by the authors of a contemporary document relating to this period. But the circumstance that these 'laws' should have been admitted, in the end of the fourteenth century, to a place in the received collections, is a trait significant of a time when the occupier or tenant of an unfeudalized holding had been reduced, practically and literally, to the condition of a tenant at will.

In short, the circumstances of Scotland towards the end of the fourteenth century are exceptionally favourable to the pretension of great landholders—which everywhere and at all periods tends to assert itself in the absence of countervailing checks—to be absolute owners of the soil. It is the same pretension which is exemplified in England in the common style of manorial records, where it became the practice, in recording the tenure, to insert the express declaration that the tenement is to be held *at the will of the lord*. The result is a striking example of the power of custom in England to prevail against what is technically called 'law.' The 'law' recognised the express condition in so far that the copy-holder was held not entitled to the King's *writ of right*<sup>1</sup>; and therefore has been said to have but an *estate at will according to the course of the Common Law*. But his customary right was very early acknowledged as capable of being enforced—indeed there is no reason to believe that these customary tenants were ever (unless in times of practical anarchy) without remedy against the usurpation of the lord;—and in the time of Edward IV. it was laid down by the judges that the copy-holder doing his custom and services, if he is put out by the lord, shall have an action of trespass against him<sup>2</sup>.

<sup>1</sup> Co. Litt. 60 a.

<sup>2</sup> Ibid. 61 a.

To the absolute dominion of the feudal owner in Scotland there came to be one compensating influence, whose beginnings may be traced—perhaps were in some measure owing—to the miserable condition to which the country had been reduced during the War of Independence. An inevitable result of the protracted misery of this war must have been that large tracts of land were suffered to go out of cultivation; and it may have been the consequence of a comparative return to peace that cultivators were enabled sometimes to make a better bargain than the conditions of the old *status* of villeinage. A commercial spirit began to form itself, under which land was ‘set’ to tenants under tacks (or contracts in writing by way of lease), and it seems probable that, under this system, cultivation was extended over a large area of land which either had fallen out of cultivation or had never previously been cultivated. The earliest document in the form of a lease known to the late Professor Innes<sup>1</sup> was a contract relating to an extensive tract of land, between the Abbot of Scone and the Hays of Leys. The date is 1312—two years before Bannockburn—and the term is thirty years. The position of the lessees was that of middlemen engaging for the rent and for services—military service to be rendered by themselves, and various dues to be rendered by the *husbandi* who would hold under them as the actual cultivators of the soil. This document gives indications of existing usages—such as that the men dwelling on the land have fuel from the common for their own use only—exactly similar to those which, in England have frequently (by the aid of the fiction of a lost charter of incorporation) become established as legal rights in favour of a class. Within a short time from the date of the lease just referred to, the practice of ‘setting’ lands by contract (*assedatio*) for a term of years or for life became not infrequent. The early leases of which evidence has been preserved, are chiefly those made by the great religious houses, who have preserved a record of such transactions. It is probable indeed that they were the pioneers in this mode of encouraging cultivation. Sometimes the tenancy is a beneficial one—for life—by way of reward for military service<sup>2</sup>. Sometimes it is by way of an improving lease, as when the monks of Arbroath let certain lands to two joint tenants for a term of five years for a yearly rent of forty shillings, and subject to the obligation to build during the first year a barn and a byre<sup>3</sup>. At what time the practice of setting lands by lease to the actual cultivators became general it would be difficult to say, but it is clear from the

<sup>1</sup> *Scotch Legal Antiquities*, p. 248.

<sup>2</sup> *Registrum de Aberbrothoc* (Bannatyne Club), No. 330, p. 284.

<sup>3</sup> *Ibid.*, No. 352, p. 309.

preamble of the Statute of James II. (1449) above referred to, that this had then become the normal condition of Scottish husbandry.

The Statute of 1449 is as follows :—‘ It is ordained for the safety and favour of the poor people that labour the ground that they and all others that have taken or shall take land in time to come from lords and have terms and years thereof, that supposing the lords sell or alienate the land, the takers shall remain with their tacks on to the ish (or end) of their terms into whose hands soever the lands come, for sic like mail (or rent) as they took them for.’

This Act proves, by way of contrast, how insecure must have been the position of the general body of cultivators at the time of its enactment. Struggles were made to defeat its provisions by indirect methods of conveyance ; but at length the security of the lessee (having a tack or lease in writing) was established against every form of alienation by the lessor. In competition, however, with the superior of the lessor, the lease was still ineffectual ; and consequently, when there was a minor heir to the property, the superior, in right of his wardship, might bring in a new tenant<sup>1</sup>. It accordingly became the rule, as stated by Lord Stair, that ‘ tacks sleep during wardship ;’ and this lasted until the abolition of wardship, with the other incidents of military tenure, by the Act of 1747 (20 Geo. II. c. 50), after the Jacobite rising of 1745. To this Act I shall refer in a concluding article, in which I hope to bring the sketch of Scotch tenure up to the present time ; and to make some remarks in relation to what is called the ‘ Crofter question.’

R. CAMPBELL.

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<sup>1</sup> *Robert Maitland of Queensbury v. William of Douglas of Drumlanrig*, Acta Auditorum, 16 Oct. 1483.



## ON A POINT IN THE LAW OF EXECUTORY LIMITATIONS.

**I**T has never, I believe, been suggested that, so far as dealings with the freehold and inheritance of lands are concerned, there is any difference between executory limitations contained in a deed and executory devises ; in the sense that anything can be done by the one method which could not, by the use of apt language, have been equally well done by the other. But since the rules governing the interpretation of deeds are not identical with those governing the interpretation of wills, it does not follow that the effect of a limitation contained in a deed must always be the same as the effect of the same limitation contained in a will. So far, for example, as these rules require in a deed greater strictness in the use of words to limit estates of inheritance, deeds will of course differ from wills in respect to executory limitations amounting to the *quantum* of a fee. And equally of course, in respect to all questions of verbal construction, where there is any difference between deeds and wills, there is nothing to exempt executory limitations from any rules which are applicable to limitations in general.

Moreover, it is possible that, by reason of the difference between the mode of the operation of a will and the mode of the operation of a deed, a limitation which would have been good in a will may be void in a deed ; and it is equally possible, that a limitation which would have been good and effectual in a deed, may be void, or ineffectual, in a will. Thus a grant contained in a deed may be indefeasibly good, while a similar devise in a will is liable to be defeated during the testator's lifetime, though the will remains unrevoked, by a subsequent grant made by deed. In so far as executory limitations fall under these principles in common with all other limitations, they are of course liable to the same practical consequences. Whether there are any principles peculiar to executory limitations, introducing into them alone a distinction of this nature, whereby it comes to pass that an executory devise in a will may under peculiar circumstances be good, while the same limitation would under the same circumstances, if it had been contained in a deed, have been bad, may be a question of difficulty ; though reported cases are not wanting in which this question has been answered in the affirmative, or in which the affirmative answer to this question has been tacitly assumed.

The doctrine, that executory limitations, whether in a deed or in a will, are not subject to the strictness of the rules relating to common law assurances, which were designed to prevent the abeyance of the seisin by act of parties, does not mean, that it is lawful by an executory limitation to cause an abeyance of the seisin, but, that the mode of the operation of the assurances under which executory limitations may arise is such, that by their means an abeyance of the seisin is not caused, under circumstances which would have caused an abeyance of the seisin if the assurance had been a common law assurance. The abeyance in the one case is no more lawful than in the other; but in the one case it (by construction of law) does happen (or rather, would happen, if the limitation were allowed to take effect), and in the other case it does not. It follows, that if any peculiar form of executory limitation could be devised, whereby, if it were allowed to be valid, an abeyance of the seisin would be caused, such an executory limitation would be void, no less than a similar limitation if contained in an assurance made at the common law. And if it is the fact that there exists any peculiar form of limitation, which is such that in a conveyance to uses it would cause an abeyance of the seisin, while in a will it would not, it will follow that a given limitation made by way of executory devise may by possibility be good, while the same limitation, if made by way of springing or shifting use, would be void. It therefore becomes necessary to enquire into the grounds upon which executory limitations can claim exemption from the rules governing limitations contained in common law assurances; which are commonly referred to as the rules forbidding the creation of a freehold *in futuro*.

A freehold *in futuro* would be created, whenever, in an assurance taking effect at the common law, an estate of freehold is limited to commence after the expiration of a definite interval of time, or upon the happening of any specified event or contingency, other than the natural expiration of a precedent estate of freehold. Therefore, in the case of executory limitations which purport to create what, in a common law assurance, would be a freehold *in futuro*, the question arises, What becomes of the seisin during the unappropriated interval, or until the happening of the specified event or contingency?

To this question it is impossible to give the same reply in the case of executory limitations contained in a deed, as in the case of executory devises; because at the time when the deed takes effect the settlor is necessarily alive, while at the time when the will takes effect he is necessarily dead. It is a well recognised principle of law, that whatever interest, whether partial or total, and whether land or profits, in real estate, of which a testator fails to dispose effectually by his will, descends to the heir. Upon this point the

law is so fixed, that the clearest expression by the testator of an intention that the heir shall not succeed, will be of no avail, unless the property is effectually given by the will to somebody else ; and even an express trust for conversion will be no obstacle to the title of the heir, unless the proceeds of the conversion are effectually given to some other person. (*Fitch v. Weber*, 6 Ha. 145 ; *Re Cameron, Nixon v. Cameron*, 26 Ch.D. 19.) In the case, therefore, of executory devises, the reply to the question above asked is easy ; namely, that during the unappropriated interval, or until the happening of the contingency, the freehold descends upon the heir. (*Pay's Case*, Cro. Eliz. 878.) Since the time when executory limitations succeeded in forcing their way into the law, no doubt has been thrown upon the sufficiency of this explanation, in respect to executory devises.

It is a not less well-ascertained rule of the modern law, that upon any assurance of lands made without consideration, the use results to the grantor or settlor. (Co. Litt. 23 a ; and see on sect. 463.) Before the Statute of *Quia Emptores*, indeed, the use would not have resulted to the feoffor upon a feoffment in fee simple made without (express) consideration ; because the tenure, which the law implied, and by which the feoffee held of the feoffor, would have constituted in the eye of the law a sufficient consideration. After the passing of the last-mentioned statute, no such tenure could be created by a subject, and the use in fee simple would have resulted to the grantor for want of consideration. This resulting of the use originally gave rise to a trust in favour of the grantor ; but since the passing of the Statute of Uses, the resulting use, by virtue of that statute, has carried back with it to the grantor the legal estate. This doctrine of the resulting of the use was applied as well to particular estates carved out of the use, as to the complete use in fee ; and if A., without any consideration, had enfeoffed B. and his heirs, to the use, from and after the death of A., of C. and his heirs, the use during the life of A., being undisposed of, would have resulted to A., carrying with it the legal estate for his life. By such a feoffment, through the operation of the Statute of Uses, A. became tenant for his own life, the remainder in fee to C. Of course nothing hindered him from expressly limiting the use to himself for life ; for any result which may be brought about by means of a presumed intention, may *à fortiori* be brought about by means of an expressed intention. He could not, before the statute, have effected this purpose by a single feoffment made at the common law ; for if he had attempted to enfeoff C. directly in fee simple in remainder upon his (the feoffor's) own life, the feoffment would have been void, both as to the estate for life, because the feoffor cannot retain in himself the immediate seisin after a feoffment, and also as to the remainder,

because that would have been an attempt to create a freehold *in futuro*. But by means of the feoffment to uses above described, the desired result was attained without objection. The whole seisin in fee simple departed out of the feoffor into the feoffee to uses; and the whole use in fee simple, partly as a resulting use, and partly as a declared use, was by the statute transmuted into a perfectly unobjectionable succession of legal estates.

Thus it appears that, after the Statute of Uses, a limitation by way of use, which would have been void as a limitation at the common law, as being an attempt to create a freehold *in futuro*, might be valid, and might, by virtue of the statute, give rise to a legal estate having a corresponding *quantum*. These considerations are the foundation of the existence of *springing uses*: which term is used to denote those uses, capable of being executed into legal estates by the statute, which differ from strict legal limitations only in what may be styled the irregularity of their commencement in point of time. It was observed that the use undisposed of resulted to the grantor, and that the combination of this with the declared use, effectually obviated all danger of any abeyance of the seisin. This was the reply given to the above-stated question, relating to the abeyance of the seisin, so far as springing uses are concerned.

In the case above supposed, and generally in cases of springing uses, it is so obvious that the part of the use undisposed of must result to the grantor, that there seems to be some absurdity in asking the question, What would be the consequence, if this partial use did *not* result? The first impression in the reader's mind might not possibly be, that no case can be specified, where the assurance is wholly voluntary, in which the part of the use undisposed of will not result to the settlor; and Butler would rather seem to have held this opinion. If, however, we do ask the question, the natural reply would seem to be, that whenever this part of the use cannot result to the settlor, it will remain in the feoffee or grantee to uses; who therefore remains seised of the conterminous legal estate, which serves precisely the same useful purposes in his hands, that it would have served in the hands of the settlor, if the use had resulted to him. Obvious as this reply must seem, it is certain that a totally different one has been given in more than one reported case. It has been held that, where the peculiar circumstances forbade (as the Court thought) the hypothesis of the resulting of the use, the subsequent use was void, as being an attempt to create a freehold *in futuro*.

In the case of *Adams v. Terre-tenants of Savage*, 2 Salk. 679, more fully reported in Ld. Raym. 854, the case was as follows:—A settlor conveyed lands by lease and release to trustees and their heirs, to

the use of himself for ninety-nine years, remainder to the use of the trustees for twenty-five years, remainder to the heirs male of his own body, remainder to his own right heirs. The Court of Queen's Bench held that the limitation in tail male was void, because no precedent estate of freehold was limited to support it. They held that such an estate could not, under the circumstances of the case, be implied; that is, that under the circumstances there could be no resulting use to the settlor for his life.

The grounds upon which they arrived at the latter conclusion are by no means clearly stated. Fearne apparently assumes the ground to have been, that a resulting use for life cannot be allowed, when an actual use for years is expressly limited to the same person. (Fearne, Cont. Rem. 42.) It is at all events clear, from Butler's note, that he understood this to be Fearne's meaning. This view agrees very well with the language of Powell; but very ill with that of Lord Holt. The latter is reported to have said that 'where . . . upon a conveyance, such uses are limited as, *supposing the limitations to be good, would pass the whole estate*, there no use will result contrary to the express limitations of the party' (Ld. Raym. 855). This seems to mean that, whereas a contingent remainder in tail male expectant upon a term of years, followed by a remainder in fee simple, would, if allowed to be good, exhaust the whole fee, no resulting use remains for the benefit of the settlor; because, if he is taken at his word, he has disposed of the whole fee, and it is only by refusing to take him at his word,—that is, by refusing to give effect to his settlement, and declaring it bad,—that any question of a resulting use can be supposed to arise, for the purpose of making it good. Holt seems to found his conclusion upon this contradiction in terms. But Powell seems to have founded it upon the quite different view stated by Fearne, namely, that where a man has expressly taken a term of years, he must be understood to have declined to take an estate for life; which view proceeds partly upon the maxim, *expressio unius est exclusio alterius*, and partly upon the consideration that the estate for life might destroy the term of years by merger. Powell's very remarkable criticisms upon the earlier case of *Pybus or Pibus v. Mitford*, 2 Lev. 75, 1 Vent. 372, which were made by way of distinguishing that case from *Adams v. Sarage*, leave hardly any doubt that this was his meaning. These criticisms will be considered presently.

It was one of the old traditions of Westminster Hall, as I have been informed upon excellent authority, that when Holt and Powell concurred in opinion, their decision was pretty certain to be right. But I humbly submit that perhaps the benefit of this maxim does not extend to cases in which, though they agreed in pronouncing the

same decision, they differed *toto caelo* in the reasons upon which they founded it. This is a kind of agreement in which the weight of concurrent opinions does not seem to be obviously cumulative.

The case of *Rawley v. Holland*, as reported in 22 Vin. Abr. 189, *Uses*, F., pl. 11, and 2 Eq. Abr. 753, clearly supports the interpretation put by Fearn upon *Adams v. Savage*. A settlor limited lands to the use of himself for ninety-nine years if he should so long live, with remainder to trustees for two hundred years, with remainder to the use of the heirs male of his own body, with remainder to the use of his own right heirs. Both in Chancery, and in the Common Pleas upon a Case sent there from Chancery, it was held that the limitation in tail male was void; and precisely upon the reasoning alleged by Fearn, namely, that in order to its validity a precedent use of the *quantum* of a freehold must be supposed to result to the settlor, and that this supposition was incompatible with the express limitation to him of a term of years. But the Master of the Rolls is reported to have said, 'that to talk of raising an use by implication, was a mystery in law which he did not understand:' a remark which throws great doubt either upon the accuracy of the report, or upon the sobriety of his judgment.

Lastly (but not last in order of time) there is the case of *Davis or Davies v. Speed*, 4 Mod. 153, 12 Mod. 38, 2 Salk. 675, Carth. 262, Holt, 730, Skin. 351, aff. in *Dom. Proc.*, Show. P. C. 104. In this case a husband and wife covenanted to levy a fine of the wife's lands, to the use of the heirs of the body of the husband on the wife begotten, remainder to the right heirs of the husband. They had issue; and the wife died first, then the issue, and lastly the husband. It was held that the limitation to the right heirs (Salkeld absurdly says, the heirs *of the body*, who were already defunct) of the husband was void. But it is not true that this decision was founded upon the doctrine, that a resulting use of freehold in the settlor, precedent to a springing use, is necessary to the validity of the springing use. It is true, the Court remarked, that there could in this case be no such use: because the only use which would have served the supposed purpose, was a resulting use to the husband; and there could be no such resulting use in him, for the conclusive reason, that he was not the settlor; while a resulting use to the wife would not suffice, since she died in the husband's lifetime, before the springing use (to his right heirs) could arise. But an attentive examination of the reports will show that the argument was not thus advanced *simpliciter*, but by way<sup>1</sup> of

<sup>1</sup> 'For taking it as a remainder, there is no precedent estate of freehold to support it; and if you take it as a springing use, then it is . . . to arise after a dying without issue.' (Holt, 730.)

alternative. *Either*, they said, the limitation to the right heirs is a contingent remainder, *or else* it is a springing use: upon the former alternative, it is void *for want of a precedent freehold* to support it; while upon the latter alternative, though no precedent freehold is needed to support it, it is void *for remoteness*, because it is limited to arise after a general failure of issue of the body of the husband by the wife. This reasoning plainly imports, what nobody doubts, that (at common law) every contingent remainder must be supported by a precedent freehold; but it imports no such thing with respect to springing uses, or executory limitations in general. With regard to them it imports only, what also nobody doubts, that they must conform to the rule against perpetuities. Holt seems plainly to have thought that, apart from the question of remoteness, there was no objection against the limitation.

Therefore if the doctrine in question, that a resulting use to the settlor is necessary (in the kind of cases we are considering) to the validity of a springing use, is to be supported, it must be rested upon the cases only of *Adams v. Savage*, and *Rawley v. Holland*. It appears that the case of *Davies v. Speed* will by no means serve the turn; nor am I acquainted with any other that, when rightly examined, appears to be truly in point.

If this doctrine, that a springing use of freehold, not preceded and supported by another *express* use of freehold, is void whenever there cannot be a *resulting* use of freehold to the settlor, is sound, and if it is also true that the express limitation of a term of years to the settlor will, *in a deed*, preclude him from taking any further or other interest by way of resulting use: then it seems to follow that there is, in this respect, a distinction between a springing use arising under a deed, and an executory devise arising under a will. For it is impossible to doubt that the limitations which were pronounced to be bad in *Adams v. Savage* and *Rawley v. Holland*, would have been held good, if, being couched in exactly the same words, they had been contained in a will. The intermediate freehold would have been held to pass to the testator's heir at law. It is true that the point has never, so far as I am aware, been expressly decided; for the case of *Harris v. Barnes*, 4 Burr. 2157, the nearest case with which I am acquainted where the question related to an executory devise, the circumstances, though in all respects but one tallying closely with those of *Adams v. Savage* and *Rawley v. Holland*, differed in one important particular. The devise of the term of years was not made *to the heir*, to whom the unappropriated freehold was in the meantime to descend; and this was needed to make the analogy quite complete. But it must be conceded, that this distinction cannot be supposed to make any difference. At the most, it could

only affect the question, whether the testator did, or did not intend, that his heir at law should inherit any fraction of the realty of which the will did not otherwise dispose; and, as above remarked, the mere intention, or desire, of the testator, when he fails to give effect to it by an actual disposition of the property, in no way affects the rights of the heir at law.

Let us therefore enquire whether, and why, the Court, when they held in those cases that the use and with it the legal estate could not result to the settlor, meant also to deny that it could remain in the feoffees or releasees to uses. Suppose it to be well established law, that an express limitation of the use of a term of years to a settlor, will prevent his also taking an estate for his own life by way of resulting use, why should this have any further or other effect, than simply to leave the use where it is, namely in the feoffees to uses? The Court can hardly have thought that this effect followed; because, if they did, it was strongly incumbent upon them to give some reason why the seisin in the hands of the feoffees would not have served to prevent an abeyance of the freehold, just as well as if it had been in the hands of the settlor. They do not appear consciously to have entertained the question. It would rather seem, that they jumped, without any consideration, from their first conclusion, that the seisin could not result to the settlor, to the further conclusion, that it therefore could not be anywhere at all. And they seem to have held this latter opinion in a very vague and confused manner; and not at all to have adverted to its extraordinary implication, that a failure to result is equivalent to annihilation.

Much light is thrown upon this confusion of mind by Powell's criticisms in *Adams v. Savage* upon the case of *Pybus* or *Pibus* v. *Mitford*, 2 Lev. 75, 1 Vent. 372. In the last-mentioned case, a settlor, seised in fee simple, by indenture covenanted to stand seised, *immediately after the date of the indenture*, to the uses of the indenture *and to no other uses*; namely (so far as the lands in question were concerned) to the use of the heirs males of his own body by his (second) wife, with remainder to his own right heirs. It might be thought that, if any declaration of intention could possibly have prevented him from taking, or rather, retaining, an estate for his own life, the words in italics might have sufficed for this purpose. But it was decided, that he had an estate for life, which, of course, by the Rule in Shelley's Case, coalesced with the limitation to the heirs males, and gave him an estate in special tail male. Now Powell, in *Adams v. Savage*, being minded to hold that there the settlor could take no estate by resulting use, apparently thought it necessary to distinguish the case from *Pybus* v. *Mitford*.



'And therefore, by him [Powell], if there had been an express limitation in the case of *Pybus v. Midford*, limited to the covenantor, the judgment would have been otherwise.' (Id. Raym. at p. 855.) Salkeld's account is to the same effect:—'And yet, per *Powel*, J., even in that case [meaning *Pybus v. Mitford*, erroneously cited under a wrong name] if there had been an express estate limited to the covenantor, it had been otherwise.' (2 Salk. at p. 680.) Powell, therefore, is reported to have thought, that if a settlor, seised in fee simple, should covenant to stand seised to the use of himself for ninety-nine years, if he should so long live, with remainder to the heirs males of his own body, this remainder would be void, for want of a precedent freehold to support it. He seems to have tacitly assumed, that the covenantor would somehow or another have deprived himself of his own freehold, by stipulating for a term of years.

If feoffees (using that word generally, to include also releasees, conusees, grantees, and so forth) have a legal estate, not acquired for valuable consideration, upon which uses may be declared, they are liable to be deprived of that estate, either by the declaration of a use, or by the resulting of a use. But why, I repeat, should they be deprived of it, in cases where, by hypothesis, the use neither is declared, nor can result? When this question is once stated plainly, it is seen to be one which is likely to remain for a long time without any very plain answer.

Whether anybody will be found to suggest, that in *Adams v. Savage* and *Rawley v. Holland*, the Court thought that the disputed estate for life *did* reside in the feoffees to uses, but that it did not, in their hands, suffice, as it would have sufficed in the hands of the settlor, to support the subsequent limitations, I do not know. It will be time enough to deal with this suggestion, if ever it should be made. The reports contain no hint that the Court entertained any such opinion.

*Dicta* of eminent persons are not wanting, which would seem to favour the opinion, that when the use undisposed of cannot result to the settlor, it perishes absolutely, and with it the concomitant legal estate. 'Before the Statute of Uses, if there had been a feoffment to the use of A. for years, remainder (of the use) in contingency, the contingent use would have been good, for the feoffees remained tenants of the legal freehold; but since that statute it is otherwise, for now no estate remains in the feoffees.' (Ferne, Cont. Rem. 284.) But compare with this the following remark by Butler:—'However, it is to be observed, that in cases of wills, uses, and trusts, if it be inconsistent with the uses *expressly* declared, that the freehold should remain with the party (as if he has a term of years expressly given him), the law will not give him, by

implication, an estate of freehold, *if, consistently with the rules of law, it can be considered to reside elsewhere.*' (Butl. n. 2 on Co. Litt. 216a.) The authors of these two passages cannot possibly have meant to say the same thing. The latter approaches nearly to a flat contradiction of the former. Yet it is certain that Butler had no idea that he was contradicting Fearn; he would otherwise, in a note to the latter's text, have offered elaborate apologies, explanations, or perhaps retractions: an oversight which is the index to the utter confusion which has from the beginning enveloped this subject. Butler, moreover, in support of his proposition cites the cases of *Pybus v. Mitford*, *Adams v. Savage*, *Penkay v. Hurrell*, and *Davies v. Speed*; though hardly anything could be more absurd than to lump all these cases together, as if they could possibly be said to prove any one thing among them.

Of course there is a very obvious and indisputably true meaning which Fearn's words might by possibility bear: he might only have meant to say, that when the declared uses exhaust the whole fee, no use, and no estate, is left in the feoffees. Unfortunately, this innocent meaning fits in very ill with his context, and with the fact that he immediately cites *Adams v. Savage*. It is rather to be feared that he may have meant (in a vague sort of way) what is above attributed to him. But if, and in so far as, he did mean this, it appears to be one of the most purely gratuitous opinions ever entertained by any mortal. There is not a syllable in the language of the Statute of Uses to suggest, that it intended to divest any seisin out of the feoffees, except when somebody else is entitled to the corresponding use. Anybody might as reasonably pretend, that the statute renders void all feoffments made to a feoffee whose name begins with an F, or who is less than forty years old. And in *Chudleigh's Case*, 1 Rep. 120, at p. 136, it was expressly decided 'by Baron Ewens, Owen, Beaumont, Fenner, Clark, Clench, the Lord Anderson, and Popham, Lord Chief Justice,' that the statute '*doth not divest any estate out of the feoffees, but when it can be executed in the cest'que use.*'

It is not probable that Fearn would advisedly have maintained any proposition in contravention of the last-cited authority. He seems to have been puzzled; and he evidently was not at all happy in his mind about the case of *Adams v. Savage*. Immediately after the above-cited passage about no estate being left in the feoffees, he cites that case, and proceeds to comment upon it in the following words:—'The question in this case is stated to have been, whether A. was tenant in tail or only tenant for years. Now the latter conclusion must have prevailed, [granting that no use could result to the settlor,] even if the limitation to the heirs male of his body,

though void as a remainder, had been admitted effectual as a future use within the reason of the cases put by Holt,' in *Davis v. Speed*, 12 Mod. 38 at p. 39. (Fearne, Cont. Rem. 284.) This is equivalent to saying, (1) that he is not satisfied with the decision, so far as it pronounced the limitation in question to be void; and (2) that this part of the decision may be doubted, without at all doubting that A. took no estate for life, and consequently that the limitation to the heirs male of his body *did not, by virtue of the Rule in Shelley's Case, give an estate in tail male to A.* He had originally cited the case (at p. 42) as an illustration of *the necessity for an estate of freehold in the ancestor*, in order to the operation of the Rule in Shelley's Case; and he seems, at p. 284, to be consoling himself with the reflection, that the case may be a good authority for this purpose, and that the want of a resulting use to the ancestor really has this effect, whether the Court were right or wrong in thinking that it also had the further effect, of making the limitation in tail male void.

Hereby hangs a further tale of perplexity and confusion. The reader will have observed that the decision in *Adams v. Savage* consists of two separate parts: (1) that there was no resulting use to the settlor; and (2) that the subsequent limitation in tail male was void. It is quite possible to deny the second part, without at all doubting the first part; but it is absolutely impossible to deny the first part without also denying the second.

Now hear Butler. 'With great deference to these authorities [*Adams v. Savage* and *Rawley v. Holland*], and Mr. Fearne's conclusion from them, it must be considered, that in each of them, the freehold resulted to the ancestor *by a necessary consequence of law*. [The italics, here and elsewhere, are mine.] It is a rule of law which admits of no exception, that the freehold cannot be in abeyance; it may therefore be inquired, in whom, in the cited cases, it was considered to reside. It is evident that it could only reside in the ancestor or in the trustees. Now *as the judges held the limitation to the heirs of the ancestor's body to be void, they could not consider the freehold to reside in the trustees*. It must therefore *be considered to be vested in the ancestor*; and it cannot be a legal objection to this conclusion, that it destroyed the term.' (Butl. note *y* on Fearne, Cont. Rem. 41.) Butler does not seem quite to be aware how utterly his argument destroys the cases cited upon both points. He evidently thought (and I humbly agree with him) that if the freehold had been allowed to remain in the feoffees, this would have sufficed to support the subsequent limitation. But whether this is, or is not, absolutely clear, one point at all events is absolutely clear; namely, that if the freehold had been allowed to result to the settlor, this would have sufficed for the purpose. Holt and Powell could not agree as to why

the freehold did not result, but neither of them had the faintest doubt that, if it had resulted, this would have supported the subsequent limitation. It is possible to contend, that though the freehold did not result, yet it remained in the feoffees, and in their hands sufficed to support the subsequent limitation: which contention leaves the cases in possession of one half of their ruling, namely, as to the failure of the use to result. But it is quite impossible to contend that the use did result to the settlor, and yet that the cases were right in deciding, that the subsequent limitation was void for want of a supporting freehold.

In another part of the same note, Butler shows some disposition to suggest, but in a very vague and faltering way, that perhaps the Court took the subsequent limitation to be a contingent remainder properly so called, not a springing use at all, and grounded their decision upon this view. If he did mean to say this, it is inconsistent with what he says afterwards; plainly implying, that, even upon this hypothesis, a freehold in the trustees would have supported the remainder. For when he said, or implied, that this consequence followed, he must have meant to say, that it followed *upon the hypothesis, whatever it was, of the judges themselves*; for otherwise his remark would have no point or sense in it. But a detailed examination would, I think, show beyond dispute, that this supposition affords no explanation at all of the decision. It is quite true that a contingent remainder, whether created by way of use or at common law, is equally destroyed (at common law) by the determination of the precedent freehold before the vesting of the remainder. But this affords no argument in favour of the disputed cases. Though a freehold once and for all executed by the statute may not result to the feoffees, that is no reason why a freehold, which has never been executed by the statute at all, should not remain in them.

In truth, to say that in *Adams v. Savage*, and *Rawley v. Holland*, the Court thought that the disputed limitation was a contingent remainder properly so called, and not a springing use, is the same thing as to say, that at the date when those cases were decided, the existence of springing uses was not recognised by the Courts; or at least, that it was not recognised so clearly, but that the Courts might get completely confused between the idea of a springing use and the idea of a contingent remainder. And something very like this conclusion seems to have been the opinion of Sanders. (1 Sand. Uses, 147, 148.)

But the precise point in question was explicitly raised, though not decided, in the *Earl of Bedford's Case*, or *Bedford v. Russell*, Moor. 718, Poph. 3. In 4 Eliz. the Earl made a feoffment to the use of himself for forty years, remainder to his eldest son in tail male, remainder to his

second son in tail male, remainder to his own right heirs. His eldest son having died leaving only daughters, and his second son having died without issue, the Earl made a fresh settlement, to the use of himself for life, with remainder to his third and eldest surviving son in tail male, with divers remainders over. After the Earl's death, the question arose, whether the daughters of the eldest son, who were the heirs general of the Earl, were entitled, under the limitation to his right heirs in the first settlement, or whether the third son was entitled under the limitation to him in tail male in the second settlement. Judgment was given for the son, upon two separate grounds; of which the second (according to Popham the principal) ground was, that by the death of the second son in the Earl's lifetime, without issue, the remainder to the right heirs (assuming that a settlor might limit such an estate to his own right heirs) failed, because the determination of the estate tail had deprived it of the precedent freehold which was necessary to its support<sup>1</sup>. The counsel who argued in favour of the validity of the limitation, though they admitted that in an assurance made at the common law it would have failed, for the reason alleged, urged that, in an assurance under the Statute of Uses, this was no objection against its validity, because *in the meantime the seisin was in the feoffees to uses*<sup>2</sup>.

Fearne (Cont. Rem. 51) cites the *Earl of Bedford's Case* only with reference to the other point; namely, that what purported to be a remainder to the right heirs was not really a remainder, but a reversion. This opens a totally different branch of learning, into which it is impossible to enter here, and which is not relevant to the present discussion.

More might be said, if space permitted it. Enough has perhaps been said to show that, if ever any cases deserved to be pronounced 'void for absurdity,' the cases of *Adams v. Savage*, and *Rawley v. Holland*, may be in danger of that judgment.

HENRY W. CHALLIS.

<sup>1</sup> *Que le mort de John Russell sans heirs male, ad issint determine le particulier frankement, sur que le veuf as droit heirs estoit.* (Moor. 721.)

<sup>2</sup> 'For the feoffees in the mean time are persons able to hold the land, and are liable to every man's precepts, and no mischief at all.' (Moor. 720.)

ROMAN LAW IN BRACTON <sup>1</sup>.

**B**RACTON'S great work, 'De Legibus et Consuetudinibus Angliae,' has of late begun to attract more of the attention which so important a source of legal history deserves. It is indeed to be regretted that no satisfactory edition of one of the fathers of our law should yet have been published, as a critical examination of the text and MSS. could not fail to throw great light on the many and difficult questions which the study of the work suggests. Of these the extent to which Bracton has 'Romanized the law of England' is a problem of much interest and perplexity. The writer was evidently well acquainted with the laws of Rome, and in one way or another Roman learning has supplied no small part of his work, but the extent and nature of its influence is a matter of great controversy. While Mr. Reeve is of opinion that it is only used by Bracton as an illustration and ornament, not adduced as an authority, and doubts whether the Roman parts of his work if put together would fill three whole pages of his book <sup>2</sup>; M. Houard has been so struck with his Romanizing tendencies as to omit him entirely from his collection of Anglo-Norman legal sources, as a corrupter of the law of England <sup>3</sup>. Sir Henry Maine speaks of 'the plagiarisms of Bracton <sup>4</sup>,' and considers it 'one of the most hopeless enigmas in the history of jurisprudence that an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English Law, a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris.' Biener holds that Bracton allows no legislative authority to the Roman Law <sup>5</sup>; Spence, that he reproduced Roman incorporations which were good and valid English law <sup>6</sup>; while Prof. Güterbock is of opinion that Bracton has in general reproduced only those Roman elements, which were actually received in England as valid law, though in some instances he has made additions to them <sup>7</sup>. Where authorities differ so widely, a decided answer seems hardly possible.

Any student of this question labours under at least two great difficulties. While it is of the first importance to ascertain what

<sup>1</sup> The substance of this article will appear in a work to be published by the Cambridge University Press in October, on the Influence of the Roman Law on the Law of England. To this work, which obtained the Yorke Prize of the University for the year 1884, I must refer for a fuller examination both of Bracton's treatise and of the more general questions suggested by such a subject.

<sup>2</sup> i. 529.

<sup>3</sup> *Traité sur les Coutumes Anglo-Normandes*, Paris, 1776.

<sup>4</sup> *Ancient Law*, p. 82.

<sup>5</sup> *Das Englische Geschwornengericht*; cited by Güterbock, p. 56.

<sup>6</sup> Spence, i. 124.

<sup>7</sup> p. 57.

Bracton actually wrote, there is yet no edition of his work which can be considered as even moderately reliable; and while it is impossible to form an opinion as to how far some undoubtedly Roman parts of Bracton really represent the Law of England, without a careful study of the early history of the law as recorded in the Year Books, such a study is one to tax to the utmost the patience and ingenuity of the student, who has to trace through those black letter jungles of wrong references and corrupt readings, the present editions of the Year Books, some thread of law of the slightest character. Is it too much to hope that some wealthy body may yet consider a National Edition of the Year Books by a competent scholar an appropriate investment of its funds, and that the present generation may reap the fruits of its liberality<sup>1</sup>?

Of the present 'standard edition' of Bracton, it is difficult for any one who has worked with it to speak with patience. It was undertaken as part of the Rolls Series, a national work; a presumably learned and certainly titled editor purported to have laboured at it; and the result is merely a reprint of Tottell's edition with nearly all the old corruptions, a few new misprints, and many new and ingenious mistranslations. Each volume of the Rolls Series has prefixed to it a short account of the principles by which the editors are to be guided, and their connexion with the edition of Bracton has at least the merit of irony; 'the most correct text should be formed from an accurate collation of the best MSS.' is the rule for the editor; this wonderful edition of Bracton is the result the editor produces.

It is true that Sir T. Twiss may fairly urge that his instructions did not allow him to give references to the parallel passages of the Institutes, the Digest, or the Summa Azonis; 'no other note or comment was to be allowed except what might be necessary to establish the correctness of the text.' But though this might justify him in omitting twenty-three references to Roman parallel passages in twelve pages of text even though some of the omissions were the most obvious parallelisms, it would hardly be an excuse for giving twenty wrong references in the same space<sup>2</sup>. To give all parallel passages would be best, to give none may be the result of strict obedience to rules, but only to give a few, and many of those incorrect, is a course whose only merit, and that a doubtful one, appears to be to increase the knowledge of the Roman sources possessed by the unfortunate student who has to verify and correct them. John Selden was surely prophetic when he wrote of

<sup>1</sup> [An opportune question. In fact such a scheme is now afoot, but the time is not yet ripe to say more of it in public.—Ed.]

<sup>2</sup> Bracton, Twiss ed., ii. pp. 108-130.

Thornton: 'He passes by almost all the quotations of the Places cited out of the books of the Imperial Law by Bracton, which are basely handled by his Editors<sup>1</sup>.'

On one point certainly Sir T. Twiss has exceeded his instructions. His notes are sometimes useful in establishing not the 'correctness' but the incorrectness of his text. Thus Tottell's version, speaking of those who have secretly contracted an illegal marriage, says that they appear to act '*non ex parte sciente (!) vel saltem affectatores ignorantiae*,' and Sir T. Twiss reprints Tottell, with a note that one MS. has *scientiae* for *sciente*<sup>2</sup>. But the passage is a quotation from the Canon Law<sup>3</sup>, and the editor actually gives the reference, which shows the true reading to be *expertes scientiae*, as contrasted with *affectatores ignorantiae*. So that the notes the editor adds enable one by reference to correct the text at once, even if Prof. Güterbock had not corrected it some years before in his work on Bracton and the Roman Law<sup>4</sup>. And the new edition is full of such blunders.

For instance, it does not seem to need great critical skill to guess that a text which makes Bracton fix the age of majority of the heir of socage lands at twenty-five years, results from a transcriber's error of xxv for xv, and even the fact that Tottell's edition has the same mistake need not have prevented the editor from correcting the text to agree with Glanvil<sup>5</sup>. Again when Bracton is made to explain that dower must be granted '*ad ostium ecclesiae*,' and not '*in lecto mortali, vel in camera, ubi clandestina fuerint conjugia*,' it does not seem difficult to alter the odd phrase *lecto mortali* in one far more appropriate to *clandestina conjugia* — *lecto maritali*<sup>6</sup>. It surely might have struck the editor as curious that Bracton should speak of a messuage as surrounded '*fossato vel haya vel palatio*,' translated '*by a palace*' (!); and a little ingenuity would have conjectured that a paling, *palo*, or palisade, *pallacio* or *palicio* (cf. fol. 221 b), was a more appropriate environment than a palace<sup>7</sup>. So it seems unnecessary to write that slaves may be punished in a different way from freemen, *eisdem factionibus*, when the Digest (which the editor omits to mention that Bracton has here been following for some time) gives the obvious reading *facinoribus*<sup>8</sup>. One of the gems of the edition is a passage at fol. 168, where Bracton is giving a list of persons who are in possession, but do not possess; Tottell has here the ingeniously stupid reading '*usufructuarius, item usurarius*,' and our editor, instead of correcting to the obvious *usuarius*, reprints Tottell, and confirms his blunder by translating, '*likewise an usurer*.'

Sir T. Twiss has produced great confusions, usually with the help

<sup>1</sup> Selden *ad Fletum*, ii. 4.

<sup>2</sup> Br. f. 63.

<sup>3</sup> X. c. 3, 4, 3.

<sup>4</sup> Güterb. p. 127.

<sup>5</sup> Br. f. 86 b; Twiss, ii. 5; Gl. vii. 9.

<sup>6</sup> Br. f. 92.

<sup>7</sup> Br. f. 97 b.

<sup>8</sup> Br. f. 105; Dig. 48, 19, 16.



of Tottell, by the omission or insertion of the little word *non*; which might have been corrected, if not by the consideration that Bracton did not as a rule write absolute nonsense, at any rate by a reference to the parallel passages in Azo or the Digest. To take one instance only: Bracton is following Azo as to the sum which the plaintiff claims in an action, which, both say, is 'quod querens aestimaverit.' As a few lines lower the judge is allowed 'summam quam querens aestimavit moderare et minuere,' it surely might have occurred even to Sir T. Twiss that it was not likely that Bracton would have written between the two passages that the plaintiff *cannot* estimate the injury he has sustained, 'aestimare non poterit injuriam'.<sup>1</sup> And this idea would have been strengthened when, on referring to Azo, whom the editor does not cite, the passage was found to run *aestimare poterit*. I have noted at least four examples of the same obvious mistake. Of course in all of them Tottell's edition had made the blunder before.

But in his translation of the text, Sir T. Twiss has the glory of being original. I say nothing about the numerous printer's errors, the text which defines *injuria*, as 'quod non jure sit,' (perhaps because *sit* and *fit* are very much alike in Tottell's type)<sup>2</sup>, the systematic way in which *pactum* appears translated as 'fact';<sup>3</sup> or the wonderful language in which the translation is written, as where *non domino vero* appears as 'to the non-lord'.<sup>4</sup> We must reserve our admiration for the classical learning that translates *pavones* as 'seafowl',<sup>5</sup> *res incorporales* as 'immovables' (where the point of Bracton's text is a comparison of lands and servitudes<sup>6</sup>), 'actio negotiorum gestorum' by 'action on the case,' a phrase which did not come into existence till thirty years after Bracton wrote, and which translates the euphemism 'ultimum supplicium' with severe literalness, as 'the last punishment.' Of more complicated examples, I can only give a few, which are samples of many:

## BRACTON.

Liberorum autem . . . quidam sunt naturales et legitimi, qui ex justis nuptiis et legitima uxore procreantur. (Br. f. 64.)

Gifts between husband and wife should be void, et est causa, ne fiant propter eorum libidinem vel nimis eorum immoderatam egistatem. (Br. f. 29.)

<sup>1</sup> Br. f. 98 b; Azo, 1103.

<sup>2</sup> e.g. *C. de pactis*, 'the code concerning facts,' f. 16 b; *nudum pactum*, 'naked fact,' f. 99. [Let us be strictly just. This may be nothing worse than systematic failure to correct the very common printer's confusion of *f* and *p*, which in many handwritings are distinguishable only by the context.—En.]

<sup>3</sup> f. 165.

<sup>4</sup> Br. f. 155.

<sup>5</sup> f. 9.

<sup>6</sup> f. 164 b.

## TWISS.

For of children some are natural and legitimate, some (!) are procreated of a legal marriage and a legitimate wife. (Twiss i. 507.)

And there is a reason why they should not be made, on account of their lust, or their immoderate want. (Twiss i. 228.)

## BRACTON.

Item non tenetur aliquis haeres de facto, scilicet de disseysina antecessoris sui, quoad poenam disseysinae, licet teneatur ad restitutionem. (Br. f. 172.)

Si autem frater antenatus in vita patris communis obierit, relicto haerede de se, nepos vel neptis ex eo incipiet esse in potestate avi. (Br. f. 64 b.)

## TWISS.

Likewise an heir *de facto* (!) is not liable, &c. (Twiss iii. 99.)

If the elder-born brother die in the lifetime of the common father, having left an heir of his body, the nephew or niece of his body (!) will begin to be in the power of the grandfather<sup>1</sup>. (Twiss i. 513.)

With these choice specimens we may perhaps take our leave of the Twiss Museum of curiosities of editing, in which subsequent inquirers may still find a rich harvest. But it is a matter of great regret that a work of importance should be edited in so slovenly and ignorant a manner<sup>2</sup>.

Bracton's work can be divided into three parts:—

I. The part in which he has copied, with almost verbal accuracy, Azo, the Institutes, or the Digest. This consists of perhaps twenty-five folios out of the 450 or so of which his work is composed, to be found in Bk. I. (except cc. 8 and 10); Bk. II. cc. 1-4; Book III. ff. 98 b-104 b. The first Book on the Law of Persons is derived from Azo's summary of the first Book of the Institutes: the last chapter of the first book and the four chapters of Book II. from Azo's summary of the Institutes on the means of acquiring things *jure gentium*: the six folios in Book III. which deal with contracts, from the third Book of the Institutes and the Digest. The matter taken is in several places modified to represent the Law of England, and frequent omissions of unsuitable parts show an intelligent copying.

II. A part in which Roman principles appear to be the framework, though large masses of English matter are moulded on them. This consists of the rest of the second and the first treatise of the

<sup>1</sup> We must take it that Sir T. Twiss is himself the translator, as in correcting in one of his Prefaces (vi. 69) an obvious blunder, which concealed a misreading (which reference to Azo would have corrected), he says, 'the editor has by inadvertence mis-translated.' It is significant here that Sir T. Twiss refers for the text from which he prints, not to any MS., but to Tottell's edition.

<sup>2</sup> I may refer any one who may think this too strong to Prof. Vinogradoff's article on the 'Text of Bracton,' in the *Law Quarterly Review* for April, 1885, pp. 189-200, in which Sir T. Twiss' dealings with the MSS. are examined, and to Mr. Pollock's Preface to his work on Contracts, 3rd edit., pp. 7, 8. [The facts are eloquent enough without any testimony of mine. From my own partial collations of MSS. with the Record Office edition, I have every reason to believe that such examples might be largely multiplied. The most charitable supposition that could be made for the editor's scholarship would be that he caused the text to be translated by some semi-literate clerk, and did not himself even look through the translation. But one prefers not to express what, on that hypothesis, would be the inference as to his good faith.—ED.]

third Book, and the treatise on the Assize of Novel Disseisin; it deals with donation, possession, inheritance, and the outline of the theory of actions and obligations, and perhaps comprises from a third to a quarter of the work. Embedded in the English matter are some unacknowledged citations from the Institutes, Digest and Azo; but they are not very frequent or of great importance. The influence of Roman principles is clearly seen here, especially in the treatment of possession, though sometimes their only effect is to give a form to English matter.

III. The remainder, and greater part, of the work shows, in my opinion, very slight, if any, traces of Roman influences. Roman terms are occasionally used, as was natural with a writer well acquainted with Roman law, and dealing with a system till then lacking in form and precision. The few citations from Roman sources have usually done duty already in other parts of his work, and make no important additions to the matter in hand. About two-thirds of the work is of this character, English in its matter with some slight traces of scholastic form.

Space will not allow me here to do more than point out under the first of these heads, how closely Bracton has copied his models, while I think that the omissions and variations he has made throw considerable light on his method of working, and the authority of the parts he has incorporated from the Roman Law.

Bracton's first Book is misnamed 'De Rerum Divisione.' This title only applies to its last chapter, which should in strictness form the first chapter of Book II. A general introduction (cc. 1-5), and chapters 'de personis et earum statu' (cc. 6-11), compose the rest of the book. I have carefully compared it with the corresponding portions of the Summa of Azo<sup>1</sup>, and with the Justinianean sources, and I have no hesitation in saying that about two-thirds of it are taken all but *verbatim* from Azo. Where the Institutes are cited indirectly, which frequently happens, they are quoted in the form given to them by Azo. In only two places<sup>2</sup> does Bracton break away for more than three or four lines of his work from his model. On the other hand, while so much of Bracton is derived from Azo, large portions of Azo, such as the titles on *adoptio*, *capitis diminutio*, and several on *tutela* and *cura*, have been omitted as inapplicable to English Law.

A careful study of Bracton's variations from the *Summa* suggests his method of procedure. He had to reduce to form a chaotic mass

<sup>1</sup> 'Summa Azonis,' Venice, 1596; Bk. I. and II. tit. 1, of Azo's version of the Institutes.

<sup>2</sup> c. 8, on feudal dignities; c. 10, on serfs and serfdom, in the middle of which the Roman mark of tame animals, having 'animum et consuetudinem revertendi,' is applied to slaves.

of English Law and custom, 'omne jus de quo tractare proposuimus . . . secundum leges et *consuetudines Anglicanas*<sup>1</sup>.' His object was to reduce this confusion to such order that judgment by precedent or according to rule might be possible:—'a similibus procedere ad similia<sup>2</sup>.' In the Roman Law he had ready to his hand an admirable form. He followed Azo closely, omitting such parts as were inconsistent with the existing English Law; varying those parts which might by modification be made consistent; and adding illustrations of his own from English sources, where the Roman ones did not strike him as apt. But where there was no English Law on the matter treated of he adopted Azo almost exactly, not from any desire to impose Roman Law on England, but because he thus gave completeness to his exposition, while, as the matter has never arisen in English Law, he perhaps did not consider it of great importance. We can thus explain the constant appearance in the extracts from Azo of Roman terms, having no English counterpart, which Bracton has not apparently thought it worth while to alter<sup>3</sup>. To read the two works side by side is the best proof of the correctness of this theory of his method, and it would be difficult, without great tediousness, to afford equally forcible evidence; but a few striking examples of each class of variation may be supplied.

I. *Cases where Bracton has omitted passages of Azo as inconsistent with English Law.* Azo defines the seashore as public up to the rise of the highest winter tide: Bracton, following him *verbatim* before and after this passage, omits it as conflicting with the claim of the Crown to the shore between high and low water mark<sup>4</sup>. Similarly, Bracton omits the rules as to the rights of the finder of a *thesaurus*, as conflicting with the Crown rights to Treasure Trove<sup>5</sup>. And these instances are the more striking because immediately before and after the omitted passages Bracton is following Azo very closely<sup>6</sup>.

II. *Cases where Bracton has modified passages from Azo into consistence with English Law.* This is especially seen in the application of the maxim *Partus sequitur ventrem*<sup>7</sup>. This was only the English rule in cases of illegitimacy; as Bracton says, 'sequitur conditionem matris quasi vulgo conceptus.' If either of lawfully married parents was *constitutus in villenagio*, the child was a serf; but lawfully married parents, not in villeinage, made the child free, though the mother

<sup>1</sup> Bk. i. c. 6; f. 4 b.

<sup>2</sup> f. 1 b.

<sup>3</sup> e.g. 'Praetor enim jus dicitur reddere (p. 104; Br. f. 3), usus, usufructus, patria potestas, manumissio, adoptio,' the Roman names of servitudes, 'haereditas jacens, emancipatio, res sacrae, religiosae, sanctae, mobiles et immobiles.' But it is difficult to explain his adoption *verbatim* of Azo on the sacred nature of walls, and the capital offences committed by those who get over them. Br. f. 8; Azo, p. 1063.

<sup>4</sup> Br. f. 8; Azo, p. 1061.

<sup>5</sup> Br. f. 8; Azo, p. 1063.

<sup>6</sup> See also Azo, p. 1055, 'In potestate aliena sunt servi, item filii.' Bracton (f. 9 b) omits 'item filii.' He also omits Azo's passage (p. 1063) as to the sacredness of 'legati.'

<sup>7</sup> Br. f. 5; Azo, p. 1052.

was born a serf<sup>1</sup>. Bracton can hardly fail to have been aware of this difference from the Roman Law, and Littleton, who followed him, certainly was as he writes, 'et c'est contrarie a la ley civile car la est dit, partus sequitur ventrem<sup>2</sup>.' A similar change is seen in Bracton's use of the two terms, *statu liber* and *adscriptitius glebas*. The *statu liber* in Roman Law is a slave 'qui statutam et destinatam in tempus vel conditionem libertatem habet<sup>3</sup>,' being conditionally freed by will. Bracton, citing the phrase from Azo, uses it of a slave who has deserted his master and whom his master does not claim within a year<sup>4</sup>. So the *adscriptitius glebas* in Roman Law was a *colonus* bound to the land, who passed with its sale, and had no rights of property against his master<sup>5</sup>. But Bracton uses the term of a freeman holding in villeinage who cannot be dispossessed of his land by his lord so long as he pays the customary dues. Again, Azo, speaking of the duration of *patria potestas*, says, 'Item morte civili dissolvatur, ut cum pater damnatur in metallum vel in opus metalli vel deportatur in insula,' which Bracton corrects into — 'item morte civili ut si pater damnetur propter aliquam feloniam commissam<sup>6</sup>.'

III. Bracton illustrates his Roman principles by English examples. *Jus possessionis*<sup>7</sup> is explained by a feud the subject of an *assize mort d'ancestor*, and a freehold held for life. Azo's Roman illustrations of the maxim 'conditio feminarum est deterior in multis quam masculorum<sup>8</sup>' are omitted. His explanation of *emancipatio* is accompanied in Bracton by the remark 'secundum quod antiquitus fieri solet<sup>9</sup>:' and the passage on *tutela* is expanded by references to the wardship of feudal lords<sup>10</sup>. Cemeteries are introduced as an illustration of *res sacrae*, and the statement that they cease to be sacred if taken by the enemy is omitted<sup>11</sup>. And there is throughout the work a revision on minor points, which shows that Bracton has copied with intelligence. Thus he only reproduces three of Azo's six meanings of 'jus civile<sup>12</sup>,' omitting refer-

<sup>1</sup> Gütterbock's statement (p. 81), that in marriage the offspring followed the father, is shown to be too wide by Bracton's 'Item dicitur servus natione, de libero genitus, qui se copulavit villanae in villenagio constitutae sive copula maritalis intervenerit' (f. 5).

<sup>2</sup> Littleton, Tenures, § 187. As to the genuineness of this passage, see the note to this section in Tomlins' edition, London, 1841.

<sup>3</sup> Dig. 40, 7, 1.

<sup>4</sup> Br. ff. 4 b, 7, 197 b, 'Est enim statu liber qui personam habet standi in iudicio quasi liber, licet non sit; cf. Azo, 1051, 1052. Bracton also introduces a new condition of *status servi* analogous to 'liber homo bona fide serviena.'

<sup>5</sup> Cod. xi. 47; Br. f. 7, 'dicuntur glebae ascriptitii quia tali gaudent privilegio quod a gleba amoveri non poterunt, quam diu solvere possunt debitas pensiones; cf. Azo, 1051.

<sup>6</sup> Azo, p. 1057; Br. f. 6 b; cf. also Azo, p. 1077 with Bracton, f. 6 a, on 'intolerabilis injuria,' and see Vinogradoff, *Law Quarterly Review*, p. 197.

<sup>7</sup> f. 3. But see on this passage Vinogradoff, p. 196; see also on 'ingenui,' f. 5.

<sup>8</sup> Azo, p. 1054; Br. f. 5.

<sup>9</sup> Azo, p. 1057; Br. f. 6 b.

<sup>10</sup> f. 6 b.

<sup>11</sup> f. 8; Azo, p. 1062.

<sup>12</sup> f. 4; Azo, p. 1050.

ences to the Twelve Tables and the *Responsa Prudentum*, and the statement that 'jus civile' without other words refers to the Law of Rome.

To turn to positive results, Bracton<sup>1</sup> has taken the definitions of *justitia*, *jus*, *jurisprudentia*, *aquitas*, and the *tria praecepta juris*, from the Institutes as represented in Azo, together with his distinction between human and divine justice, and much connecting matter. In his fifth chapter<sup>2</sup> he has the definitions of *jus naturae*, *jus gentium*, *jus civile*, and the division into *jus privatum* and *jus publicum*, relating *ad statum reipublicae*<sup>3</sup>, and dealing with the subject matter of *sacra*, *sacerdotes*, *magistratus*. The sixth chapter<sup>4</sup> contains the Institutional divisions into *jus ad personas, vel ad res, vel ad actiones pertinentes*, and of *homines* into *liberi* and *servi*; Azo's difficulties as to *adscriptitii* and *status liberi*; the definitions of liberty and slavery, taken through Azo, from the Institutes; the maxim *partus sequitur ventrem*; and parts of Azo on *ingenui*, especially a passage on the effect of servitude during pregnancy<sup>5</sup>. In his seventh chapter he follows Azo on *libertini* and on monsters<sup>6</sup>, even in his quaint illustrations. The eighth chapter, on the ranks of persons, is of Bracton's own composition. The ninth contains the Institutional division<sup>7</sup>, 'homines sui aut alieni juris,' with Azo's addition 'aut dubii.' Azo's account of *postliminium* is taken almost *verbatim*, with one curious exception. The maxims, 'quidquid per servum juste acquiritur, id domino acquiritur,' and 'pater est quem nuptiae demonstrant,' are both adopted. The tenth chapter expands Azo on guardianship with reference to feudal wardship; and the whole of this chapter, which deals with a subject on which English materials are at hand, shows more originality. The twelfth chapter, 'De Rerum Divisione' follows Azo<sup>8</sup> very closely: it adopts the Roman divisions of *Res*; *in patrimonio nostro vel extra*; *corporales vel incorporales*; *mobiles vel immobiles*; *communes, publicae, universitatis, nullius, singulorum*; and copies Azo's illustrations all but word for word.

In fact no mere recital of similar subjects will show the identity of order and language, which proves convincingly that, during the greater part of this first book, Bracton has simply copied the *Summa Azonis*. Whether in doing so he has suppressed any English Law at variance with his text, or has added any new law to that which he found existing, or again whether the matter thus incorporated has survived in English Law are questions we must reserve. And after the examples cited by Prof. Vinogradoff, we must wait

<sup>1</sup> Br. i. c. 4; Azo, p. 1047.

<sup>2</sup> Azo has 'ad statum rei Romanae.'

<sup>3</sup> Azo, 1052; Inst. i. 4, pr.

<sup>4</sup> Azo, p. 1055; Inst. i. 8.

<sup>5</sup> Azo, Book ii. on Institutes, title 1.

<sup>6</sup> Azo, p. 1048.

<sup>7</sup> Azo, p. 1051.

<sup>8</sup> Azo, pp. 1053-4.

for a trustworthy examination of the MSS. before we can decide whether some of the modifications of Roman matter are not really glosses by English lawyers on Bracton's Roman text.

The first three chapters of Book II, 'De acquirendo rerum dominium' are taken almost literally from Azo<sup>1</sup>. They deal with methods of acquisition *jure gentium* on purely Roman lines; but Bracton's treatment shows that he is only applying Roman rules where there is no express English rule on the subject. In speaking of acquisition of wild animals by capture<sup>2</sup>, he adds to the Roman rule 'nisi consuetudo vel privilegium se habeat in contrarium,' and again 'et haec vera sunt nisi aliquando de consuetudine in quibusdam partibus aliud fiat.' Again, as to 'insulae in mari natae'<sup>3</sup>, Bracton adds 'nisi consuetudo se habeat in contrarium propter fisci privilegium': and with respect to islands in a public river, he adds to Azo's *conceditur occupanti*, his own English comment 'et per consequens regi propter suum privilegium'<sup>4</sup>.

*Occupatio*, *Alluvio*, *Accessio*, *Specificatio* and *Confusio* are all treated almost in the words of Azo, though Bracton omits most of the Roman illustrations of his model<sup>5</sup>, and adds English ones<sup>6</sup>. On minor points he corrects Azo; thus he omits the rules as to the acquisition of *thesaurus*, as inconsistent with English Law; he changes the *difficilis persecutio* of a hunted animal, which destroys property in the pursuer, to *impossibilis persecutio*<sup>7</sup>; he inserts the Roman provisions as to *agri limitati*<sup>8</sup>, but omits the rule as to their capture by the enemy, as improbable in England. In several places he abridges his models; he gives the rule as to *accessio literarum*, and states frankly 'ut in Institutis plenius inveniri potest et in summa Azonis<sup>9</sup>;' Azo, in fact, gives some fifty lines of illustration of the rule, which Bracton omits. In treating of accession of buildings he adopts the maxim 'omne quod inaedificatur solo cedit,' but abbreviates and anglicizes his model. Here his copying results in two curious slips<sup>10</sup>; he quotes Azo that *confusio* differs from *mixtio* in three respects, but he only gives two of them, and by the omission of a negative<sup>11</sup> in an attempt to combine two sentences in one, he entirely misrepresents Azo. His fourth

<sup>1</sup> Br. ff. 8 b-11; Azo, pp. 1063-1072.

<sup>2</sup> Br. ff. 8 b, 9; Azo, p. 1064.

<sup>3</sup> Br. f. 9; Azo, p. 1064.

<sup>4</sup> Br. f. 9 b; Azo, p. 1065. Compare also Azo, 1063; 'per occupationem eorum quae non sunt in bonis alicujus, ut sunt ferae bestiae' with Bracton's insertion after 'alicujus' of the clause 'et quae nunc sunt ipsius regis de jure civili, et non communia ut olim.' But several of these extracts look suspiciously like glosses which have wandered into the text.

<sup>5</sup> 'de glande legenda, tigno injuncto, actio de dolo, doli exceptionem;' Azo, p. 1064.

<sup>6</sup> Br. f. 8 b. He adds *cygni* to Azo's list of tamed wild animals.

<sup>7</sup> Azo, p. 1064; Inst. ii. 1, 12; Br. f. 8 b.

<sup>8</sup> Br. f. 9 b; Azo, p. 1065.

<sup>9</sup> Br. f. 10; Azo, p. 1067.

<sup>10</sup> Br. f. 10 b; Azo, p. 1069.

<sup>11</sup> Ibid., 'Si autem (non) separari.'

chapter<sup>1</sup>, which treats donation as a means of acquisition *jure civili*, instead of *jure naturali*, as in Azo, copies almost word for word Azo's section on *res corporales seu incorporales*, and on servitudes. But with this chapter the continuous copying of Azo ceases: and up to this point we infer that, while Bracton has adopted Roman Law bodily, he has yet modified or omitted whatever portions are actually inconsistent with existing English Law.

Bracton's third Book is divided into two treatises, *De Actionibus*, and *De Corona*, which deals with Criminal Law. The treatise on Actions includes also Obligations, and completes Bracton's consideration of Contracts, which had begun with *Emptio-Venditio* and *Locatio-Conductio* in the second Book.

On Sale, Bracton deviates considerably from Roman law<sup>2</sup>. *Emptio-Venditio* in the Roman system was a consensual contract; but according to Bracton, unless at the time of the agreement an earnest (*arrha*) is given, or the whole or part of the price is paid, or until the contract is reduced to writing, either party can withdraw from the mere agreement<sup>3</sup>. Justinian called the *arrha*, *argumentum emptionis*, a proof, not a part of the contract; but Bracton quotes the same phrase as proving the *arrha* to be an essential element of a valid contract. Glanvil had doubted whether the vendor could retreat from the contract, without forfeiting the earnest; Bracton decides, in accordance with Justinian, that he forfeits *twice* the earnest<sup>4</sup>. Between the times of agreement for sale, and of delivery by the vendor, the Roman Law put the thing sold at the buyer's risk, so far as accident was concerned; Bracton, following Glanvil and the old law, puts it at the risk of the seller<sup>5</sup>. His reference to conditional sale is from the Institutes<sup>6</sup>. According to Bracton and Justinian the buyer of movables may rescind in case of undisclosed faults; but in the case of land, according to Bracton, the buyer must bring an action to enforce delivery of the land as contracted for. In modern times the development of commerce has led to the adoption of *Caveat Emptor* as the general rule, but subject to many exceptions<sup>7</sup>.

<sup>1</sup> Br. f. 10 b; Azo, 1070-1072.

<sup>2</sup> Br. ii. c. 27; Glan. 144; Just. Inst. iii. 23, pr.

<sup>3</sup> Inst. iii. 23, pr.; Br. 61 b. But in c. 28, apparently following Justinian, Bracton speaks of sale as contracted 'postquam de precio convenerit.'

<sup>4</sup> Glan. x. 14; Br. f. 62. The 'Regiam Majestatem' also forfeits *twice* the earnest. See Moyle, Inst. i. 418 note.

The doctrine of forfeiture of earnest still survives; see *Horne v. Smith*, L. R. 27 Ch. D. p. 102, where Fry, L. J., expressly refers it to Bracton and the Roman Law.

<sup>5</sup> He actually cites the Institutes, substituting *qui eam tenet* (i. e. *venditorem*) for *emptorem*. Br. f. 62; Just. Inst. iii. 23, 3.

<sup>6</sup> Ibid. iii. 23, 4.

<sup>7</sup> Benjamin On Sale, 3rd edit., pp. 606-633.



Bracton treats *Locatio-Conductio* very briefly<sup>1</sup>; the fixing of the price is its investitive fact. The hirer's liability 'qualem diligentissimus paterfamilias' is taken from the Institutes, and the liability of the hirer's goods in his hired house for rent is treated on Roman lines.

In the first half of the third Book the influence of the Roman Law is very marked: much of the text is taken word for word from the Institutes, and parts are derived from the Digest and from Azo. The scantiness of Bracton's exposition of the law of contracts is explained, on the one hand by the slight importance of personal property, on the other by the jurisdiction of the Ecclesiastical Courts over all promises not susceptible of proof by the strict rules of the Common Law, as *laesiones fidei*, breaches of faith<sup>2</sup>.

The first four chapters are composed almost entirely of Roman material<sup>3</sup>. Indeed the form, which is Institutional and Academic, lends countenance to the supposition that Bracton lectured on the Civil Law at Oxford. '*Actio*' is defined, following the Institutes and Azo, as 'jus prosequendi in iudicio quod sibi debetur'<sup>4</sup>; and the subsequent explanations are taken from Azo. The *Actio*<sup>5</sup> is said to arise from preceding obligations as a daughter from a mother, the comparison being Azo's. The division of obligations, 'orientes ex contractu, vel quasi, sive ex maleficio vel quasi,' is taken from Justinian<sup>6</sup>, and the subsequent doctrine of *vestimenta pacta* is also civilian.

Obligations<sup>7</sup> are defined in the words of Azo, following the Institutes, as 'juris vinculum, quo necessitate adstringimur ad aliquid dandum vel faciendum;' they are divided, *re, verbis, scripto, consensu*; and real obligations (*mutuum, commodatum, depositum, and pignus*) are dealt with in the words of Justinian<sup>8</sup>, omitting the technical terms of the Roman *actiones*. This passage is not filtered through Azo, but taken direct from the Institutes, neither does Bracton appear to have followed Glanvil in this, the most Roman part of Glanvil's work. The passage as to liability for accidental loss is obscure<sup>9</sup>, but the printed version appears to contradict Glanvil's statement of the English Law<sup>10</sup>, which, following an older law, made the *commodatarius* liable for *casus*, while Bracton,

<sup>1</sup> Br. ff. 62, 62 b; Just. iii. 24, 5, et al.; Güt. pp. 146, 147.

<sup>2</sup> Glan. x. c. 8, 18; Bracton, f. 100 a—'de quibus omnibus conventionales stipulationes omnino curia regis se non intromittit nisi aliquando de gratia.' Pollock on Contracts, 139, 4th ed.; Güt. p. 139.

<sup>3</sup> ff. 98 b-104 b.

<sup>4</sup> *Prosequendi*, printed by the 1569 edition and Twiss, is probably a printer's error. Azo and the Institutes have *persequendi*. Azo, 1118; Inst. iv. 6, pr.

<sup>5</sup> Br. f. 99; Azo, 1103.

<sup>6</sup> Just. Inst. iii. 13, 2; Güt. 140.

<sup>7</sup> Br. f. 99; Azo, 304; Inst. iii. 13, pr.

<sup>8</sup> Inst. iii. 14.

<sup>9</sup> Owing to probable corruption of the text. Lord Holt quotes a different version.

<sup>10</sup> Gl. x. 13.

in accordance with the Institutes, relieves him, if he has acted as 'diligentissimus paterfamilias'¹.

While the general treatment of obligations *verbis, per stipulationem*² is Institutional³, Bracton makes an important adaptation to English procedure. A simple stipulation, as we have seen, could not be sued on in the King's Courts, as being incapable of proof. After suggesting that a deaf man might make a stipulation by nods or writing, he adds⁴ 'et quod per scripturam fieri possit, stipulatio et obligatio videtur, quia si scriptum fuerit in instrumento aliquem promississe, perinde habetur ac si interrogatione praeecedente responsum sit,' and though Bracton is silent, *Flota* expressly says that a writing without seal will not suffice⁵. Again: 'Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit, sive non, obligatur ex scriptura, nec habebit exceptionem pecuniae non numeratae contra scripturam, quia scripsit se debere.' This was contrary to Roman Law which allowed such an exception to be used within two years⁶. In this practical adaptation of the Roman Law, by merger of the obligations *verbis et litteris*, Bracton found a connecting link between his Roman principles and the English Law: with a similar object he omits the rule 'alteri stipulari nemo potest,' and makes such a stipulation possible even *sine poena*⁷. Apart from these differences the minor distinctions of the Roman Law are faithfully reproduced⁸, even to the extent of speaking of a judicial stipulation as 'quod fit jussu praetoris.' But it may well be doubted whether these extracts have had any substantial influence upon English Law.

Bracton just touches on obligations *ex consensu*⁹, but as he has already dealt with sale and hiring, and as purely consensual contracts could have no place in the King's Courts, he does no more than mention them. Similarly with obligations *quasi ex contractu* he merely mentions the heads contained in the Institutes, using the technical Roman terms, and says no more¹⁰. The persons through whom an obligation is acquired¹¹, the means by which an obligation is dissolved, and the general rule, 'obligatio dissolvitur eisdem

¹ Güt. 141 n.; Br. f. 99 b; Inst. iii. 14, 2; *Flota*, ii. 56, § 5, follows Bracton.

² Br. ff. 99 b, 100; Inst. iii. 15 and 19.

³ Br. f. 100, at the end of a passage taken from Dig. 44, 7, 1, 15.

⁴ Pollock, 138; Br. f. 100 b; Holman, 272; *Flota*, ii. 60, 25; Güt. 144. Cf. Br. f. 101, 'obligatio tollitur, si dicitur . . . et responditur, vel scribatur.'

⁵ Inst. iii. 21, pr. (before Justinian, 5 years).

⁶ Cf. Inst. iii. 19; 19 and 21; Br. f. 100 b.

⁷ e.g. 'Stipulationes pure vel modo, sub conditione; facta et loca in stipulationibus, judiciales et conventionales stipulationes; stipulatio praepostera.'

⁸ f. 100 b.

⁹ Br. ff. 100 b, 101; Inst. iii. 28 and 29.

¹⁰ Cf. Br. f. 100 b, with Inst. iii. 27.

modis quibus contrahitur,' with several technical terms<sup>1</sup>, are taken from the Institutes.

Delicts and quasi-delicts are also treated very shortly, the examples of a quasi-delict being the Institutional one of a judge knowingly giving a wrong judgment<sup>2</sup>. *Injuria* is defined, after Justinian, as *quod Jure non fit*, and the Roman rule of non-liability of heirs for their ancestor's delicts is followed<sup>3</sup>.

Bracton identifies actions with *placita* or pleas<sup>4</sup>: he adopts both Glanvil's division of *civilia-criminalia*, and Azo's of *realia, personalia, mixta*, which seems a combination of the Institutional divisions *in rem, in personam*; and *rei vel poenae persequendae vel mixtae*<sup>5</sup>. The term *crimina capitalia* is from the Institutes<sup>6</sup>, though the illustration is changed. Personal actions<sup>7</sup> are defined in the words of Azo<sup>8</sup>, and Bracton adds that the heir is bound '*nisi fuit poenalis*.' Personal actions *ex maleficio*<sup>9</sup> are again divided into '*quae persequuntur poenam, vel ipsam rem et poenam*:' while actions *in rem* are divided, as in Glanvil, into *petitory, super proprietate rei*, and *possessory, super possessione*<sup>10</sup>. The *actio mixta* is defined in Azo's words '*tam in rem quam in personam, quia mixtae habent causam ad utrumque*'<sup>11</sup>, and a number of the following divisions are taken from the Roman Law<sup>12</sup>.

The Institutional division of Interdicts; *causa recuperandae, adipiscendae, retinendae possessionis*; is applied by Bracton to actions, and identified with the leading Assizes<sup>13</sup>. Under *actiones recuperandae possessionis causa* he places the Assize of *Novel Disceisin*, and identifies it with the '*actio unde vi*' (*sic*). *Actiones adipiscendae possessionis causa* include the Assize *Mort d'ancestor*,

<sup>1</sup> 'Exceptionem doli; pactum de non petendo; exceptionem metus; exceptionem iurijurandi; exceptionem rei judicatae; acceptilatio, novatio; quasi traditio;' and the subject-matter of the *stipulatio Aquiliana*, though the name is not used.

<sup>2</sup> Br. f. 101; Inst. iv. 5, pr.

<sup>3</sup> Inst. iv. 4, pr.; cf. Br. f. 101 b.

<sup>4</sup> Gl. i. 1; Br. f. 101 b.

<sup>5</sup> Br. f. 101 b; Azo, f. 1119; Inst. iv.; 6; 1, 18-20; Coke, Inst. ii. 21, 285.

<sup>6</sup> Inst. iv. 18, 2.

<sup>7</sup> Br. f. 102; Inst. iv. 6, 1; cf. Azo, f. 1119.

<sup>8</sup> Br. f. 102; Azo, 1119, '*quae competunt contra aliquem ex contractu, vel quasi, ex maleficio, vel quasi, cum quis tenetur ad aliquid dandum vel faciendum*.' The phrase '*actiones, ex contractibus*,' as applied to them is Azo's, who contrasts it with '*actiones ex legibus*.' Azo, 1131.

<sup>9</sup> Cf. Inst. iv. 6, 18; Azo, p. 1126.

<sup>10</sup> Glan. i. 3; Azo, f. 1119; Inst. iv. 6, 1; Br. f. 103; Güt. 151.

<sup>11</sup> Azo, 1126; Br. f. 102 b.

<sup>12</sup> e.g. '*simplices, duplices; perpetuae, temporales*,' Br. f. 102 b; Azo, 1129, 1130; Inst. iv. 12, pr. '*transitoriae*;' Azo, 308; Br. f. 103; '*in simplum, duplum, triplum, quadruplum*,' Azo, 1127; Br. f. 103; Inst. iv. 6, 21, 24; '*directa-contraria*,' Br. f. 103, to which Bracton adds '*indirecta*;' '*confessoria-negatoria*,' Azo, 218; Dig. 8, 5, 2 pr. though Bracton makes '*actio confessoria, cum dicat quis aliquem rem corporalem suam*,' instead of limiting it to the assertion of a servitude, as in the Roman Law. He also uses the term *praesudicialis* of an *actio* instead of a *formula*, Br. f. 103, and several terms not otherwise used in English Law, e.g. *Actio legis Aquiliae—vi bonorum raptorum*.

<sup>13</sup> Br. f. 103; Inst. iv. 15, 2.

identified with the 'actio quorum bonorum.' An instance of *actiones retinendae possessionis* is found in 'interdicta ne quis alteri vim fia'

In treating of 'quibus competant actiones,' Bracton appears to vary from Roman Law. The Roman *actio furti* was open to any one *cujus interest rem salvam fore*, but not to the owner, if he had an action against the person from whom the goods were stolen. Bracton allows the owner an *actio furti sive condictio*, against the thief or his successor. Now the bailee at English Law<sup>1</sup> had an action against the thief, and for that reason was liable over to the owner, who according to Roman Law would therefore have had no *actio furti*. Probably Bracton means by 'actio furti sive condictio' no more than *condictio*, in which case he accords with the Roman Law which gave the *dominus* a *vindicatio*, *actio ad exhibendum* or *condictio*, for the thing itself, though the *actio furti* was not open to him<sup>2</sup>. The *Actio legis Aquiliae*<sup>3</sup> is thus adapted to English Law, 'Actio legis Aquiliae de hominibus per feloniam occisis vel vulneratis dabitur propinquioribus parentibus, vel extraneis homagio vel servitio obligatis, ita quod eorum intersit agere,' which appears to refer to the *werfeld* while anticipating Lord Campbell's Act.

Other Roman actions, *actio injuriarum*<sup>4</sup>, *quod metus causa*<sup>5</sup>, *de dolo*, are briefly dealt with. The *Actio de vi* is described as *duplex*, 'scilicet rei restitutoria et poenalis,' whereas the Institutional<sup>6</sup> meaning of the term is 'quia per utriusque litigatoris in his condicio est nec quisquam praecipue reus vel actor intelligitur, sed unusquisque tam rei quam actoris partem sustinet.' In dealing with the 'Actio quod vi aut clam'<sup>7</sup> Bracton follows the Digest closely, except that so far as the Interdict is penal, or for compensation, it could not be brought against the heirs according to Bracton, whereas the Digest gave it to and against heirs 'in id quod ad eos pervenit'. The *Actio sive Interdictum de itinere actusque privato* is cited *verbatim* with the prefix, *Aut enim praetor*.

At this point, Bracton's close following of the Institutes ceases, though the influence of the Civil and Canon Laws is still noticeable. Frequent Roman citations are found, especially towards the end of the treatise, on the question of the order in which actions

<sup>1</sup> Holmes, C. L. 175.

<sup>2</sup> Cf. Inst. iv. 1, 19.

<sup>3</sup> Br. f. 103 b, the rule as to *actio vi bonorum repletorum* is taken from Inst. iv. 2, 2.

<sup>4</sup> Br. f. 103 b; Inst. iv. 6.

<sup>5</sup> Ibid.; Inst. iv. 6, 27; Dig. 4, 2, 14, 3.

<sup>6</sup> Inst. iv. 15, 7.

<sup>7</sup> Br. f. 104; Dig. 43, 24, 15, 3. Bracton's clause 'sed datur in eo (sic Twiss), quae sunt restitutoria,' may be meant to cover this.

<sup>8</sup> Br. f. 104; Dig. 43, 19; 1 pr.

<sup>9</sup> Cf. 'actio praedialis,' f. 104, 'crimen falsi,' f. 104 b, the passage on *judicium*, f. 106, taken from Azo, p. 158, and on *murus*, f. 106 b, from the Canon Law and Code, which is expressly cited (Cod. 9, 27, 3); Güt. p. 154.

should be tried, where in two folios there are found eleven quotations from the Digest and Code, and one from the Canon Law<sup>1</sup>. Bracton cites the well-known Roman maxim, 'quod principi placuit legis habet vigorem,' with the addition of a quotation apparently from the *Lex Regia* which is expressly referred to: the distinction between ordinary and delegated judges is also derived from the Canon Law<sup>2</sup>. In short, the whole treatise shows considerable study of the Roman Law, and is largely made up of Roman material, though it may be doubted whether it practically affected the English courts in any marked degree.

I have now completed my examination of the first of the portions into which Bracton's work has been divided, but space fails me to deal here with the other two parts<sup>3</sup>. There remains, however, the important question whether, as regards this Roman Law which Bracton incorporated, he did, as Spence and Güterbock hold<sup>4</sup>, only reproduce what was already held as valid law in England, being thus a trustworthy source of law, and not a plagiarist; or, as Sir Henry Maine suggests, did he actually introduce new Roman matter as English Law<sup>5</sup>? There seems to me to be very slight materials in existence for a positive answer to this question; but I myself should incline to agree with Sir H. Maine (though I think his estimate of Bracton's indebtedness is as excessive as that of Mr. Reeves is under the mark<sup>6</sup>), that, as regards the first part of Bracton's work, it was new matter to the English Law, directly copied from Roman sources, to fill up a framework of his first three books which he had adopted from the Institutes. As to the second part, I think that Bracton has both introduced new Roman matter, and reproduced English Law, derived from the Roman by the decisions of other clerical judges, and then recognized as the law of the land.

In considering Bracton's first Book, a conjecture was offered as to his method of writing<sup>7</sup>, and we have found no reason to depart from the opinion there expressed. English Law was reduced to order on a Roman framework, furnished with many Roman terms, its gaps filled up with actual Roman matter so long as this was not inconsistent with English Law. At the same time Roman influences, acting on the judges, vary some existing English rules, such as those as to nuptial donations, curtesy, and forfeiture of earnest. But I know of no case where Bracton has cited Roman Law, the previous English rules being to a contrary effect, unless

<sup>1</sup> ff. 114, 114 b.

<sup>2</sup> Br. f. 107, 108; Gü. p. 155. <sup>3</sup> v. supra, pp. 429, 430. <sup>4</sup> Spence, i. 123, 124; Gü. 57.

<sup>5</sup> Maine, *Ancient Law*, p. 82.

<sup>6</sup> Maine, 'one third of matter, and whole of form:' Reeves, 'not three pages' (l. 529).

<sup>7</sup> v. supra, p. 431.

indeed some recent decisions give him warrant. On the contrary we have seen many examples of his 'intelligent copying,' and in the rest of his work, we may compare his adaptation of the definition of theft, the conception of *donatio*, and the account of treasure-trove. This intelligent copying contrasts strongly with the unintelligent plagiarism of his followers, which converted the '*actio familiae heriscundae*' into '*accioun mixte que est appellé en la ley le Emperour, accioun de la mesnee dame de Herciscunde*'.<sup>1</sup> To him English Law is undoubtedly indebted for an extensive Roman terminology which survives to the present day; the Roman form of his first three Books has been less fortunate, though Blackstone's Commentaries show some traces of its influences. But I do not think that Bracton himself is responsible for many material alterations based on the Roman Law, though he records some important ones which have been made by his predecessors and contemporaries under civilian influences; and certainly M. Houard's charge against him of Romanizing the law of England cannot to any serious extent be justified.

T. E. SCRUTTON.

The following additional specimens of Sir Travers Twiss's dealing with Bracton have been communicated to the Editor by a friend:—

'Perhaps one who himself has had sad experience may be permitted to warn any of your readers who may be inclined to verify Bracton's citations against trusting to the English version for which Sir Travers Twiss is answerable. The task of finding cases in the rolls is always laborious, and is not lightened by such translations as the following:—

BRACTON.

Vol. ii. p. 94. de hac materia inveniri poterit de termino Sanctae Trinitatis anno regni regis H. Septimo.

Vol. v. p. 470. ut de termino S. T. anno regis H. quarto.

Vol. vi. p. 54. probatur de termino S. Michaelis anno regis H. xvi. incipiente xvii. in com. Midd.

Vol. i. p. 504. in comitatu Sussex.

Vol. iii. p. 300. in com. Sussex.

Vol. v. p. 68. in com. Lync.

TWISS.

on this subject a case will be found in Holy Trinity Term in the sixth year of King Henry.

as in Holy Trinity term in the fifth year of the king.

is proved in St. Michael's term. [Year and county omitted.]

in the county of Suffolk.

in the county of Essex.

in the county of Leicester.

'These curiosities have simply fallen in my way. I have not sought for them. How many more of the same kind might be

<sup>1</sup> Britton, iii. 7. 1.

found I do not know, nor shall I inquire, for these few have wasted time enough. Doubtless they show nothing worse than carelessness about a matter which deserved the greatest care, the same sort of carelessness that (vol. v. p. 428) translates *petens* by *tenant* instead of *demandant*, and (vol. i. p. 106) *feoffato* by *feoffor* instead of *feoffee*; the same sort of carelessness that within the compass of two consecutive pages (vol. i. pp. xviii, xix) can call the king in whose reign the Statute of Westminster I. was passed thrice *Edward III.* and once *Edward I.* The translator of course knew that *calcaria deaurata* (vol. i. p. 278) does not mean *gilded sandals*, for elsewhere (vol. v. p. 82) he renders the same phrase by *gilt spurs*. One of the most interesting passages in the whole book (vol. iii. p. 300) is utterly perverted, because for the Latin *dictum fuit praedicto Martino* we get the English *it was said by the aforesaid Martin*. It must be a mere clerical slip which gives us *by* where we should expect *to*, though a slip which spoils the whole story. But then by way of compensation, and so that another story may be spoilt, we have (vol. i. p. 102) *donatio facta ab ea* represented by *the donation made to her*. It were difficult indeed to guess what was the clerical slip which turned (vol. i. p. 84) *Est autem donatio quaedam institutio* into *But donation is a kind of purpose*; nor is it easy to see how Bracton's very intelligible (vol. i. p. 304) *incorporalia non possunt possideri nec usucapi nec sine corpore tradi* became the merely nonsensical *incorporeal things cannot be possessed or be subjects of usucaption, nor can be delivered without a person*. Such slips we must regret; for they seriously impair the keen delight we must all have in a translation which converts (vol. i. p. 332) *actio negotiorum gestorum* into *an action on the case*.

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## COMMON LAW AND CONSCIENCE IN THE ANCIENT COURT OF CHANCERY.

**I**T has commonly been supposed that the equitable jurisdiction of the Court of Chancery was altogether different in origin from its ordinary or common law jurisdiction. The opinion is, perhaps, not inconsistent with the evidence upon which it was formed, but seems to deserve reconsideration in connexion with three distinct but closely associated branches of enquiry. These are:—

- (1) The functions of the Chancery as the *Officina Brevium* or fountain-head of justice sending forth its remedies for wrongs in the form of Original Writs returnable in other Courts.
- (2) The judicial functions of the Chancery in proceedings commenced otherwise than by Bill.
- (3) The judicial functions of the Chancery in proceedings commenced by Bill.

The first of these three subjects appears to have been commonly regarded as being less closely connected with the other two than it really was; and the last two appear to have been insufficiently illustrated by early cases.

There was a doctrine, so old that it is difficult to fix its age with precision, according to which there could not be any wrong which had not its appropriate legal remedy. The remedy existed in the form of the Original Writ which issued out of the Chancery upon a proper representation there of the facts to which it was to be adapted. It was, however, very soon found that this theory, though most satisfactory as a theory, was sometimes a little at variance with the exigencies of every-day practice and the circumstances of human life. The difficulty was recognised in the Statute of Westminster the Second, c. 24. By that Act an attempt was made to provide for cases to which the writs in the Chancery Register were not strictly applicable. The conclusion is of great importance in relation to the subject now under consideration:— ‘And whosoever it shall happen from henceforth in the Chancery that in one case a writ is found, and that in like case falling under the same law and needing like remedy a writ is not found, let the Clerks of the Chancery agree in making a writ, or



adjourn the complainants to the next Parliament. And let the cases in which they cannot agree be set forth in writing, and let the Clerks refer the cases to the next Parliament. And let a writ be made by agreement among men learned in the law, so that it happen not from henceforth that the Court of the Lord the King do fail complainants when seeking justice<sup>1</sup>.

The Chancery is here recognised as the place in which new remedies are to be devised when necessary, but subject, in cases of extraordinary difficulty, to a reference to Parliament and the assistance of those who were learned in the law. The reference to Parliament and the agreement of men learned in the law appear at first sight to be somewhat abruptly brought into juxtaposition. But the Judges were members of the Council; petitions were commonly presented to the King 'in his Council in his Parliament' in relation to suits actually pending in various Courts; and, as will presently appear, decisions were given on judicial proceedings in the Chancery '*de avisamento peritorum de Concilio*.' The Council, in fact, or the Council in Parliament, exercised a general supervision over all legal matters, though for certain purposes the Chancery was regarded as an office of Parliament.

If, now, we consider for a moment the judicial proceedings on what is usually called the Common Law side of the Court, under what is usually called its ordinary jurisdiction, we shall find much to remind us of the Act which provided for writs *in consimili casu*. In cases of *Scire facias* to repeal Letters Patent or upon Recognisances in the Chancery, and in Traverses of Office, the nature of the jurisdiction exercised may be best understood by the aid of the form in which the judgment was given. Without always preserving exact verbal identity it preserved a general uniformity in its outline or framework. Judgments of this kind have been preserved in considerable numbers *in filaciis Cancellariae* among a class of documents usually assigned to the common law side of the Court and now known as '*County Placita*.' The following instances may sufficiently illustrate the subject:—'*Habita plena deliberatione cum toto Concilio domini Regis, videtur Curiae*,' &c.; '*De avisamento Justiciariorum et Servientium ipsius domini Regis ad Legem, ac aliorum peritorum de Concilio ejusdem domini Regis in eadem Cancellaria ad tunc existentium, consideratum fuit quod literae praedictae revocentur et adnullentur*;' '*De avisamento domini Cancellarii Angliae, Justiciariorum, Servientium ad Legem, et Attornati ipsius domini Regis consideratum est*,' &c.

<sup>1</sup> This is an independent translation, differing slightly both from that given in the '*Statutes of the Realm*' and from that given in the '*Statutes at Large*,' but will, it is believed, be found to agree with the original Latin as printed in 2 Inst., 405.

From these examples, ranging in date from the reign of Edward III. to that of Henry VI., it will be seen that judicial functions in the Chancery, even on the so-called Common Law side, were not always, if ever, exercised by the Chancellor alone. The authority of the Council or of constituent members of the Council was commonly asserted, or at any rate their advice was considered necessary. The proceedings are thus wholly distinct from those in the Courts of King's Bench and Common Pleas, where (though points of law might be referred to the Council during the progress of an action) judgment was given on the authority of the Justices of those courts respectively.

These facts should be borne in mind in considering the case of *Hals and others v. Hyndley*<sup>1</sup>, to call attention to which is one of the principal objects of this article. It is probably the earliest (being of the reign of Henry V.) in which proceedings by Bill addressed to the Chancellor can be traced from the Bill itself to the decision. It was clearly not at common law, because the want of a common law remedy was the ground of the Bill, and yet it bears in many respects the strongest resemblance to proceedings which have in later times been thought to belong to the Common Law side of the Chancery.

The general heading or description of the proceedings is in the same form as the headings or descriptions of proceedings upon *Scire facias*. It is, perhaps, worth quoting in its entirety:—

'Placita coram Domino Rege in Cancellaria sua apud Westmonasterium in Octabis Sancti Michaelis anno regni Regis Henrici quinti post Conquestum septimo.'

Then follows a statement commencing, 'Be it remembered' ('Memorandum' in the original Latin) to the effect that John Hals, William Clopton, esquire, Robert Chichele, Thomas Knolles, William Cavendish, citizens of London, Robert Cavendish, John Tendryng the younger, William Bartilmewe, chaplain, James Hog, and Philip Morcell had exhibited 'venerabili in Christo patri Thomae Episcopo Dunelmensi, Cancellario Angliae, quondam Billam, quae sequitur in haec verba.'

The Bill (which, it will be seen, itself suggests the idea of a *Scire facias* towards the end) is in French, and may be thus translated:—

John Hals [and the other plaintiffs, as above] very humbly pray

<sup>1</sup> This case exists among the class of documents known in the Public Record Office as 'County *Placita*,' and generally supposed to belong to the Common Law side of the Court of Chancery (County *Placita*, Essex, No. 75). It was found by chance, during a search made with the object of illustrating, by the corresponding record, a report in the Year Books of a *Scire facias* in the Chancery. It is, however, but one of innumerable instances in which the legal historian might find altogether new material among the Public Records, and in which the value of the Public Records might be brought into greater prominence by careful study from a legal point of view.

[*suppliant*] that (whereas one John Hyncley, of Thurlow in the County of Suffolk, esquire, has wrongfully disseised the said orators [*suppliauntz*], since the last passage of our Sovereign Lord the King to the parts of Normandy, of the manor of Pentlow and the advowson of the church of the vill of Pentlow with their appurtenances in the vill and lordship of Pentlow, whereof they were in peaceable possession at the time of the same passage, and it was so ordained by our same Sovereign Lord the King, upon his said passage, that no assise of Novel Disseisin should be prosecuted against any person whatsoever until our said Lord the King should return into England, wherefore they cannot have remedy by assise of Novel Disseisin to recover the said manor with the advowson and appurtenances aforesaid, to the great damage and annihilation of the poor estate of the said orators if they be not aided by your very gracious Lordship in this behalf) it may please your very gracious Lordship to consider this matter, and thereupon to command the said defendant to answer to the said orators in respect of the disseisin aforesaid, and whether he hath or knoweth anything to say for himself<sup>1</sup> wherefore the said orators should not be restored to their former possession of the manor with the advowson of the church and appurtenances aforesaid together with the issues and profits thereof in the meantime taken, for the sake of God and as a work of charity ('pur Dieu et en eovere de charite').

The *subpoena*, to compel Hyncley's appearance, then appears at length. Both the writ and all the subsequent proceedings are in Latin.

Hyncley appeared, prayed and had oyer of the Bill, and then answered or pleaded<sup>2</sup> to the following effect :—

One John de Cavendish, being seised of the manor and advowson, enfeofed thereof one Andrew Cavendish and Rose his wife to hold to them and the heirs of the body of Andrew. Andrew and Rose were seised, and had issue William, who is still living and with the King in Normandy. Andrew died seised, and Rose, who survived him, leased the manor and appurtenances to one Thomas Clerk for a term of years still unexpired and, during that term, executed a charter of feoffment of the manor and advowson to John Hals and other feoffees (being the plaintiffs named in the Bill), and a letter of attorney directing certain persons to give livery of seisin to the feoffees. The feoffees and the persons named in the letter of attorney went to the manor with the intention respectively of receiving and

<sup>1</sup> It will be perceived that the form of a writ of *Scire facias* has served as a precedent for this part of the Bill.

<sup>2</sup> The distinction between a Plea and an Answer in Chancery was not recognised until a much later period.

giving livery of seisin, but the tenant for years did not and would not attorn to the feoffees. Rose thereafter took the profits of the manor to her own use, and so died seised thereof in her demesne as of free-hold. After her death John Hyncley, the defendant, as father of Katharine the wife of Andrew's son William and his next friend, at the time at which the disseisin is supposed to have been made, while William was abroad with the King, entered upon the manor and took and is at present taking the profits thereof to the use of William and with his consent. And Hals and the other feoffees, by colour of the charter and letter of attorney, would have entered upon the manor upon the possession of William and expelled him therefrom, and this John Hyncley, the defendant, would not permit them to do. '*Quæ omnia et singula idem Johannes paratus est verificare, pro-ut Curia, &c. Unde non intendit quod prædictus Johannes Hals et alii feoffati prædicti restitutionem manerii prædicti cum pertinentiis habere debeant, &c.*'

The plaintiffs (saying by way of protestation that they did not admit the allegations of the defendant) replied to the effect that Rose was seised in her demesne as of fee of the manor and advowson, and enfeoffed thereof John Hals and the other feoffees, long before the King's last passage into Normandy, and while William was in England, and that Thomas Clerk, the tenant for years, attorned to them so that they were seised of the manor and advowson in their demesne as of fee long before the last passage of the King into Normandy. And afterwards Rose by a deed (produced in Court) released to the feoffees then in possession of the manor and advowson all her right and estate therein, and bound herself and her heirs to warranty. And now her heir is William. And Rose had nothing in the manor and advowson, nor did she take any profits thereof, after the feoffment, except at the will of the feoffees; and they were seised until driven out by the defendant after the last passage of the King into Normandy '*in forma qua ipsi per Billam suam prædictam supponunt. Et hoc parati sunt verificare, &c. Unde, ex quo prædictus Johannes Hyncley expresse cognovit expulsionem prædictam, petunt quod ipsi ad possessionem manerii prædicti una eum exitibus et proficuis inde a tempore expulsionis prædictæ in forma prædicta factæ restituantur, &c.*'

The defendant (saying by way of protestation that he did not admit that Rose had ever been seised in her demesne as of fee, or had released to the feoffees, as they alleged), rejoined that Rose died seised of the manor and advowson as he had previously alleged, *absque hoc* that the tenant for years attorned to the feoffees, and *absque hoc* that the feoffees had any thing in the manor and advowson at the time at which the release was supposed to have been made.

'Et hoc paratus est verificare pro-ut Curia, &c. Unde petit iudicium, et quod prædictus Johannes Hals et alii feoffati prædicti de restitutione sua manerii prædicti in hac parte præcludantur, &c.'

The plaintiffs sur-rejoined that Rose was seised and enfeoffed them, that the tenant for years attorned, and that Rose released to them while they were in full possession of the manor, as they had previously alleged, *absque hoc* that Rose died seised of the manor and advowson, or took any profits thereof after the feoffment, except at the will of the feoffees. 'Et hæc omnia petunt quod inquirentur per patriam.'

The defendant joined issue—'et prædictus Johannes Hyncley similiter'—just as in any other Court.

The issue was tried in a manner which is very remarkable. It was not sent into any other Court, but was treated as the subject of an Inquisition to be returned into the Chancery in the same manner as an Inquisition *post mortem* or other Inquest of Office. The special commission to take inquisition or verdict appears among the proceedings:—

'Henry, by the grace of God, King of England and France, and Lord of Ireland, to his beloved and faithful William Hankeford, Richard Norton, and William Cheyne, greeting. Know that we have assigned you jointly and severally to enquire by the oath of good and lawful men of the county of Essex by whom the truth of the matter may best be known whether' &c. [Here follow at length the allegations made on both sides, which it is unnecessary to repeat.] And if the jurors found in accordance with the allegations of the plaintiffs they were further to enquire on what day the expulsion from the manor and advowson took place, and the value of the manor *per annum*, 'and the truth respecting all other points and circumstances in any way concerning the premises. And therefore we command you that at certain days and places which ye shall have appointed for this purpose, ye make diligent Inquisitions on the premises and send them clearly and openly made without delay, to us in our Chancery, under your seals or the seal of one of you, and under the seals of those by whom they shall have been made.'

Hankeford alone took the Inquisition and returned it into the Chancery. The jurors found in accordance with the allegations of the plaintiffs, stating also the day of the expulsion and the value of the manor *per annum*. 'In cujus rei testimonium juratores prædicti huic Inquisitioni sigilla sua apposuerunt.'

Thereupon the plaintiffs 'venerunt coram ipso domino Rege in Cancellaria sua prædicta,' and prayed that they might be restored to their possession of the manor and advowson, together with the mesne profits, according to the form and effect of their Bill.

Then follows the judgment in these words:—‘*Super quo, habita super præmissis matura et diligenti deliberatione cum Justiciariis, et Servientibus dicti domini Regis ad Legem, ac aliis peritis de Concilio suo in Cancellaria prædicta existentibus, de eorum avisa-mento consideratum est quod prædicti Johannes Hals, Willelmus Clopton, Robertus, Thomas Knolles, Willelmus Cavendisshe, Robertus, Johannes Tendryng, Willelmus Bartilmewe, Jacobus, et Philippus ad possessionem suam manerii et advocacionis prædictorum cum pertinentiis, una cum exitibus de eodem manerio a prædicto die Mercurii perceptis, restituantur.*’

With the exception that they were commenced by Bill, and that appearance was compelled by *subpoena*, the whole of the proceedings resembled those on the so-called Common Law side of the Court. The pleadings between the Bill and the joinder of issue were, except in the conclusions praying for restitution or refusal of restitution, just such as might have been used in the Court of Common Pleas; and the final conclusion to the country with the *similiter* was in the ordinary common law form. The mode of arriving at the truth concerning the facts upon which issue was joined was simply that with which the Chancery had long been familiar in the ordinary Inquests of Office.

A word or two, however, may be necessary in relation to the persons who were appointed Commissioners for the purpose of taking the Inquest, Inquisition, or verdict. It will be observed that they are not described as Justices, or as holding any office, but simply as ‘*dilecti et fideles*.’ But as they were named William Hankeford, Richard Norton, and William Cheyne, and as the Chief Justice of the King’s Bench was named William Hankeford, the Chief Justice of the Common Pleas Richard Norton, and a puisne Judge of the King’s Bench William Cheyne, the triple coincidence leaves hardly any room for doubt that the Commissioners may thus be identified. They were no doubt included among those Justices and members of the Council upon deliberation with whom the judgment was ultimately given.

The Court, therefore, which heard the cause, and which, whatever may be its proper designation, gave judgment as prayed in the Bill addressed to the Chancellor, practically never lost sight of the matter even when the parties concluded to the country. The Letters Patent nominating the Commissioners passed under the Great Seal. The warrant—whether ‘by the King himself’—‘by writ of Privy Seal’—or otherwise—does not appear. But the whole transaction was very different from that of sending an issue to be tried in another Court, and comes very near if it does not actually amount to the calling of a jury by the authority of the Chancery itself for

the purpose of trying an issue joined in the Chancery. This, it has generally been said, the Chancery had not the power to do. It is however clear that a power existed, and was actually exercised, to obtain the verdict of a jury in proceedings by Bill addressed to the Chancellor without the aid of the Courts of King's Bench or Common Pleas. The power did not, perhaps, exist in the Court of Chancery, but may have been derived from a higher source. The Petition or Bill to the Chancellor was only a substitute for a Petition to the King, or King in Council, or King in Council in Parliament, the proceedings were before the King in his Chancery, and judgment was not given without the advice of the Council. The Chancery, in fact, appears to have been regarded as an office connected with the Council and Parliament, and, being the office for the issue of original Writs, was the most natural place for the discussion of the proper remedy when, for any reason, an Original Writ was inapplicable. A Commission to enquire concerning certain matters as well as for other purposes could, of course, issue under the Great Seal by authority of the King in Council. If, then, the whole proceedings are regarded as being under the King and Council, through some general delegation of power to the Chancellor to receive and examine Petitions or Bills, there is a complete unity of jurisdiction throughout.

It will be observed that the decision is in the form of a Judgment ('consideratum est'), and not of a Decree ('ordinatum et decretum est'), and that judgment ('judicium') was prayed in the course of the pleadings. It is commonly stated that there was a decree in Chancery as early as the reign of Richard II.; and could such a decree be produced it would be of great value for comparison with the proceedings in *Hals and others v. Hynceley*. That decrees were made by the King with the advice of his Council in the reign of Richard II. is a fact which admits of no dispute, but that they were made in Chancery, or in consequence of a Bill presented to the Chancellor, has yet to be shown. The proceedings in *Hals and others v. Hynceley* render it far more probable that the first decisions upon a Bill in Chancery took the form of judgments, and that the adoption of the form of a decree resembling that in which the King and Council administered extraordinary remedies, was of later date.

Sir Edward Coke, whose authority was once regarded as almost infallible, is responsible for a statement often copied and commonly accepted that the first known Chancery Decree was in the seventeenth year of the reign of Richard II. It is strange that so painstaking an author as Spence should have accepted Coke's assertion on this point without referring to the authority which Coke gave. Had he taken this simple precaution he would never have written

the following sentence and note: 'References to the Council were still made in extraordinary cases of a nature purely civil, but it seems to have been considered there that the Chancery was the proper Court for making decrees in such matters. See the case Rot. Parl. 17 R. II. 2 Inst. 553, 4 Inst. 83<sup>1</sup>.' Even in the cited passages in the Institutes there is little to warrant Spence's general proposition, for Coke merely says that the Chancellor '*confirmed*' by his decrees the King's award made by the advice of his Council.' Had the Chancellor really done this it would have been a very memorable proceeding, but, as a matter of fact, he did nothing of the kind.

Coke's account of the case is erroneous in many particulars. He has not even correctly stated the names of the parties. What appears upon the Roll of Parliament<sup>2</sup> is briefly this. There is a Petition of John de Wyndesore to the King and to the 'tres sages Seignours de Parlement.' It contains a very long recital to the effect that the Petitioner and 'Monsire Robert de Lisle' had put themselves upon the order, award, and judgment of the King in respect of all disputes relating to certain manors; that the King had charged and commanded his Council to hear and examine the matters in dispute; that it appeared to the Council that Wyndesore had been ousted by De Lisle from the manors; that the King by advice of his Council ordered and decreed ('ordeigna et decrea') that Wyndesore should be restored to his previous estate in the manors; and that while Wyndesore was suing the necessary writs to be restored in accordance with the decree, Richard le Scrope purchased the manors of De Lisle by champerty, so that no execution could be had. Wyndesore therefore prayed restitution in accordance with the Decree made, not by the Chancellor but by the King with the advice of his Council.

His petition was read in Parliament, and various documents relating to the matter were there exhibited, including some produced by the Keeper of the Privy Seal and the Keeper (*custos*) of the Rolls. Among these was the King's writ of Privy Seal, reciting the decree of the King and Council, and directing the Chancellor 'to cause to be made out writs under our Great Seal, in due form, to the said Robert that he make restitution to the same John of the manors,' &c., 'and also to our Sheriff of the said county of Cambridge, that he be intendent' in carrying out the restitution. The writs drawn pursuant to these instructions and enrolled were also read. In them the King's Decree is recited (*ordinavimus et decrevimus*, &c.). The operative part of the writ, or, as Coke calls it, 'Injunction,'

<sup>1</sup> 1 Spence, 345.

<sup>2</sup> Rot. Parl. 17 Ric. II. No. 10 (printed, vol. iii. pp. 310-313).



addressed to De Lisle, is 'ideo vobis mandamus quod restitui faciatis,' and equivalent words are used in the writ addressed to the Sheriff. The Decree is throughout described as the Decree of the King, made by the advice of his Council; and the authority given to the Chancellor under the Privy Seal, is expressly limited to that of preparing and issuing writs, '*de executione Decreti facienda.*'

Upon a subsequent petition from De Lisle, the King sent another writ of Privy Seal, directing the Chancellor to prepare Letters Patent to the effect that Wyndesore was to be left to his remedy at common law, '*aliqua ordinatione seu decreto per nos in contrarium factis non obstantibus.*' Thus, even after the supposed 'confirmation' in Chancery, the decree is described in the same words as before. From first to last there is no decree in Chancery mentioned, for the simple reason that no decree in Chancery was made.

Spence has cited another alleged decree in Chancery of the reign of Richard II. upon the authority of Sir Francis Moore's Reports<sup>1</sup>. In the place to which he refers there certainly do occur the words 'Decree en Chancery per ladvice des Judges' as applied to something which happened in the reign of Richard II.; but they occur in such a manner as at once to suggest a doubt and to render verification impossible. The report or note consists of a few lines only; there is nothing to show at what time it was made by Moore (who was King's Serjeant in the 12th year of James I.), and it is referred to the forty-first year of the reign of Elizabeth. In Easter Term in that year it is stated that Egerton, then Keeper of the Great Seal, said he had seen a precedent ('president') of the time of Richard II., to which he applied the above words 'decree,' &c. But neither the year of the reign nor the names of the parties are given, and any attempt to identify the case in any contemporary documents would therefore necessarily be vain. The actual words in the report can be accepted only as subject to all the following possible causes of error:—that Egerton did not care to distinguish carefully between a decree made by the King with the advice of his Council, and a decree made by the Chancellor; that Moore did not quote the precise words of Egerton in his manuscript notes; that the notes may have been inaccurately transcribed before they were sent to the printers; and that the printers did not reproduce the transcript with exact fidelity. Any one who has compared printed reports in French with the MSS. will know how frequently mistakes creep in. If the case cited by Coke, when examined and tested by the enrolment to which he refers, is found to give no sort of warrant for the assertion that it is an example of a decree in Chancery, it would hardly be prudent to accept as an example the

<sup>1</sup> 1 Spence, 345; Moore, Rep. 554.

case cited by Moore, which comes to us at third hand, and does not afford the means of further investigation.

The case *Hals and others v. Hyndley* may, therefore, perhaps fairly be regarded as the first in which we have the complete proceedings on a Bill addressed to the Chancellor; and it is remarkable that the decision did not technically take the form of a Decree, but followed the lines of a Judgment given upon *Scire facias*, and other proceedings on the so-called Common Law side of the Court. Even the Bill was made to savour of the latter jurisdiction by the introduction of a clause borrowed from the writ of *Scire facias*. There appears to be here a real instance of a connecting link in a process of development. It is to be remembered that a writ of assise of Novel Disseisin would in this case have issued out of the Chancery but for the fact of the King's general ordinance to the contrary. It was in the Chancery that another remedy was sought and was applied. But the methods used were for the most part those already familiar to the Chancery not as a Court of Equity according to later notions, but as a Court which, according to those later notions, is clearly distinguished from a Court of Equity. On the other hand, these familiar Chancery methods were not in early times regarded as being at common law. It was a subject of complaint in a petition in Parliament that the Justices of the King's Bench and Common Pleas were withdrawn from their own Courts to hear proceedings on *Scire facias* and Traverses of Office in Chancery; and the mischief which was alleged in consequence of this practice was the delay which it caused in the administration of the common laws of the realm<sup>1</sup>.

On the whole, it seems clear that, as late as the reign of Henry V. there was no broadly marked distinction, as defined at a later period, between the two classes of judicial functions exercised in the Chancery. There was naturally a distinction (though apparently not any difference of origin) between the more or less extraordinary judicial functions exercised in it and the ordinary functions exercised in it as the office for the issue of Original Writs which were returnable and triable in other Courts. But, in the regular course of human affairs, that which is at one time extraordinary comes at length, from long familiarity, to be regarded as ordinary. If, too, in earlier times the extraordinary remedies took the form of Judgments, and some of them in later times the form of Injunctions or Decrees, a new element of difference was at length introduced. The proceedings which followed the old methods were classed as ordinary, those which followed the new as extraordinary.

<sup>1</sup> 'A grant averisment de lesploit de vos communes leys de vostre roialme.' Original Parliament Roll, 2 Hen. IV., No 95. The passage is not quite correctly printed in 3 Rot. Parl. 474 b.

The division between the two kinds of judicial functions was, however, wanting in clearness even as late as the end of the sixteenth century. Staunford, whose 'Exposition of the King's Prerogative' was published in 1590, was evidently in some uncertainty about the matter. In one passage<sup>1</sup> he says, in relation to a Traverse of Office in the Chancery, 'Note, that if the party take a Traverse which is judged insufficient in the law, this is peremptory unto him, and he shall not be received after to take a new, as appeareth in 40 Assise, 24. Howbeit T. 14 E. 4.<sup>2</sup> the contrary opinion is holden, and that it is not peremptory, because it proceedeth in the Chancery which is the Court of Conscience. But, as to that, a man may answer and say that a Chancellor hath two powers, the one absolute, the other ordinary, and this Traverse is before him by an ordinary power, in which case all things touching the same must proceed as it should before any other ordinary Judge of the common law, and therefore it should appear . . . . . that if the party be nonsuit in his Traverse it is peremptory unto him, for so might he delay the King infinitely. *Tamen quære.*' Staunford probably leaned to the opinion that Traverses of Office belonged to a jurisdiction different from that of the Court of Conscience; but the words '*Tamen quære*' show that he did not consider the point to be settled. In another passage<sup>3</sup> he allows the contrary opinion to pass unchallenged:—'In 14 E. 4, fo. 7<sup>4</sup> it appeareth that one had traversed an Office which was sent into the King's Bench to try, and had forgotten to sue his *Scire facias*, and yet he was suffered to go again into the Chancery to pray a *Scire facias* upon the first Traverse, for it was said that the Chancery is a Court of Conscience, and for that cause the thing that was there amiss may be reformed at all times.'

In the end, of course, the difference between the two branches of the judicial functions of the Chancery became very distinctly marked, and was recognised by Statute. The case of *Hale and others v. Hynckley*, however, seems to be a curious monument of a time when the Chancery was not very clearly distinguished from the Council, and when lawyers had not arrived at any satisfactory distinction between a Court of Conscience and a Court of Common Law in Chancery.

L. OWEN PIKE.

<sup>1</sup> Fol. 65 b.

<sup>2</sup> The Year Book, Trinity, 14 Edward IV, No. 8.

<sup>3</sup> Fol. 77.

<sup>4</sup> Again the Year Book, Trinity, 14 Edward IV, No. 8.

## THE ADMINISTRATION OF EQUITY THROUGH COMMON LAW FORMS.

**E**QUITY and its administration have been favourite topics with law reformers. Whether the distinction between equity and law is a sound and essential one, whether equity can be administered by the same court that administers law, and whether equity can be absorbed into the common law and be administered by common law forms have been the great questions. In the solution of the last question the American State of Pennsylvania has had a long practical experience. Her system, which is correctly described as the administration of equity through common law forms, has now been in existence for more than one hundred and fifty years. No other commonwealth in the world has tried the experiment in so thorough a manner or on such an extensive scale. It is therefore fair to say, that the exact value of the system, what it can and what it cannot do for the conduct of litigation, ought to be found in the experience of Pennsylvania.

The subject naturally divides itself into three parts. *First*, the various unsuccessful attempts, from the founding of the Colony in 1681 until the year 1836, to obtain courts with the usual Chancery powers. *Second*, as a consequence of these failures, the growth during the same period, of the administration of equity through common law forms. *Third*, the period from 1836 to the present time, during which the Courts have gradually obtained from the legislature nearly all the ordinary powers of Chancery.

William Penn obtained his charter for Pennsylvania in 1681, and by its terms could have at once erected a Court of Equity<sup>1</sup>. He did not do so. Apparently he was not an admirer of such courts; for he describes the Indians as not 'perplexed by Chancery suits,' and in accordance with his Quaker belief he made arrangements for having appointed by every County Court 'three peacemakers,' who acted as arbitrators to prevent law-suits<sup>2</sup>.

But the General Assembly, which was created by Penn as the legislative body of the Colony, was of a different mind. In 1684 it made two provisions for introducing equity. The first made the County Courts courts of equity as well as of law. The second created a Provincial Court, which was to be a court for appeals from

<sup>1</sup> 1 Proud's Hist. Pa. 175.

<sup>2</sup> Ibid. 255, 262.

the County Courts, and was also to try all cases, both in law and in equity, not triable in the County Courts<sup>1</sup>. Both of these provisions were repealed by the English Government in 1793. The first was re-enacted by the General Assembly the same year that it was repealed. But it is believed that very little business was transacted under either of them. It is also probable that any equity that was administered at this time was not the technical and scientific equity of lawyers, but a sort of natural equity, consisting largely of the amendment of judgments at law which were considered too harsh. The judges had great discretionary powers, and were usually laymen. In fact there were very few trained lawyers in the Colony<sup>2</sup>.

After this there were four more futile attempts to establish equity. They are chiefly interesting as showing the relations of the Colony to the mother country in the matter of the repeal of laws.

The first of these attempts was in 1690. The General Assembly limited the jurisdiction of the County Courts by enacting that they should hear equity cases only when they were under the value of ten pounds. The English Government repealed this Act in 1693. It was re-enacted the same year and re-enacted again in 1700; but apparently it produced no results<sup>3</sup>.

In 1701 an Act remodelling the courts of the Colony, and apparently repealing all prior regulations in regard to equity, gave equity powers to the Courts of Common Pleas, and an appeal in equity cases to the Supreme Court. Nothing came of this Act and it was repealed by the home government in 1705<sup>4</sup>.

In 1710 the General Assembly made another attempt. A Court of Equity was to be held by the Common Pleas judges four times a year in every county. Appeals could be taken to the Supreme Court, and questions of fact were to be settled by a reference to Common Pleas. This was repealed in 1713<sup>5</sup>.

In 1715, a 'Supreme or Provincial Court of Law and Equity' was established. This was likewise repealed in 1719<sup>6</sup>.

These were all failures. But in 1720, at the suggestion of Governor Keith, a separate Court of Equity was provided. It lasted sixteen years, and was not interfered with by the home government. It is to be observed that the other attempts were all law courts with an equity side. But this court, founded in 1720,

<sup>1</sup> Duke of Yorke's Laws, &c. 167, 168; Rawle, Essay Eq. in Penna. 9.

<sup>2</sup> McCall, Judicial Hist. of Pa. 21, 27; Lewis, Courts of Pa. in Seventeenth Cent. 6; Brightly, Eq. in Pa. 29.

<sup>3</sup> Duke of Yorke's Laws, &c. 184, 225.

<sup>4</sup> Rawle, Essay Eq. in Pa. 11, 12; 1 Carey and Bioren, Laws of Pa. 33.

<sup>5</sup> 1 Carey and Bioren, Laws of Pa. 79.

<sup>6</sup> 1 Carey and Bioren, Laws of Pa. 110.

was the first and only separate Court of Equity Pennsylvania has ever had. Considerable business was transacted by it. But unfortunately for the court's existence the Governor was its Chancellor, and the colonists were so jealous of any power exercised by the King of England, or his representative the Governor, that in 1736 they brought to an end the only real Court of Chancery they ever possessed<sup>1</sup>.

For the next hundred years—that is to say, until the final grant of equity powers in 1836,—the lovers of Chancery met with even less success. By the Constitution of 1776 they got for the law courts the powers of equity so far as related to perpetuation of testimony, obtaining evidence outside of the State, and the care of the persons and estates of the insane. The Legislature was at the same time allowed to grant such other Chancery powers as might be found necessary. But no other powers were granted, except a method of supplying lost deeds and writings, and a proceeding in the nature of a bill of discovery against garnishees in foreign attachment. The Constitution of 1790 mended matters by giving somewhat larger discretionary powers to the Legislature. But that conservative assembly exercised them only to the extent of letting the courts appoint and dismiss trustees, compel them to account, compel answers on oath in certain cases of execution, and when the vendor of lands had died, complete the contract of sale<sup>2</sup>. The inconvenience of this meagre grant was a little alleviated by the Legislature's appointing a 'Committee of Grievances,' which in cases of great hardship gave liberal relief<sup>3</sup>.

Throughout the whole early history of Pennsylvania, it appears that there was always a party which wanted Courts of Chancery, and sometimes succeeded in getting them. This party was hindered in the colonial times by the British Government continually repealing the Colony's laws. They had an equally troublesome obstacle in the endless feuds between the colonists and their successive Governors<sup>4</sup>. These quarrels were so bitter and hard-fought that law-making and the execution of the laws were often forgotten. 'If we have lived free from open rapine,' said one of the Governors, 'tis more owing to the honesty of the people than any public provision made against it<sup>5</sup>!' Before and immediately after the Revolution the same party was thwarted by the jealousy which the people felt for any exercise of unusual power. And in later years they were opposed in the Legislature and throughout the State by another party. This new party took the ground that Chancery Courts were contrivances of

<sup>1</sup> Rawle, *Essay Eq. in Pa.* 19-53.

<sup>2</sup> Rawle, *Essay Eq. in Pa.* 59-61.

<sup>3</sup> McCall, *Judic. Hist. Pa.* 25.

<sup>4</sup> There was also from the very first a small party which disapproved on principle of Chancery powers. Lewis, *Courts of Pa. in Seventeenth Cent.* 7.

<sup>5</sup> 2 Col. Rec. 312.

the Devil to defeat justice, and that Pennsylvania had a system of equity of her own, which was complete in itself, and would in time reform the world.

So, with the exception of the sixteen years from 1620 to 1636, the Courts of Pennsylvania were, for over a hundred and fifty years, left in this predicament—that, in an enlightened community whose trade and commerce were growing every day, they were obliged to administer justice without the aid of a Court of Equity. It is not surprising that they struck out into a new path and did something unheard of in the annals of Anglo-Saxon jurisprudence. If their action was a piece of judicial audacity, it was authorized and justified by the circumstances<sup>1</sup>.

The precise time at which the courts began to administer equity through common law forms is not known. Some say it was done from the beginning<sup>2</sup>. The first reported case<sup>3</sup> on the subject was decided in 1768. It was an action of debt on a bond, and the defendant offered to prove failure<sup>4</sup> of consideration. The court admitted the evidence, saying, 'there being no Court of Chancery in this province, there is a necessity, in order to prevent a failure of justice, to let the defendants in, under the plea of payment, to prove mistake, &c.' The Chief Justice added, that he had known this as the constant practice of the province for thirty-nine years. In 1783 the case of *Kennedy v. Fury*<sup>5</sup> decided that a cestui qui trust of land could bring ejectment in his own name, the court observing that otherwise 'he would be without remedy against an obstinate trustee.' These decisions show very clearly how in certain plain cases, and to prevent intolerable hardship, the courts deliberately usurped the necessary powers.

The case of *Wharton v. Morris* (1785) displays a further development<sup>6</sup>. After reciting the lack of Chancery and the resulting grievous inconvenience, Chief Justice McKean says, 'This defect of jurisdiction has necessarily obliged the court, upon such occasions, to refer the question to the jury under an equitable and conscientious interpretation of the agreement of the parties.' He then goes on to inform the jury of the equities of the case. In the colonial times the equity thus charged to the jury was not technical. It was the so-called natural justice, named by Austin the '*arbitrium* of the

<sup>1</sup> Chief Justice Gibson, in *Torr's Estate* (2 Rawle, 253), said, 'As we cannot hope to see a separate administration of equity, we are bound to introduce it into our system as copiously as our limited powers will admit.'

<sup>2</sup> Brightly, Eq. in Pa. 5.

<sup>3</sup> *Swift v. Hawkins*, 1 Dallas, 17.

<sup>4</sup> In the report of this case it is stated that the defendant offered to prove want of consideration, but it has always been considered as a misprint for 'failure.' Rawle, Essay Eq. in Pa. 57.

<sup>5</sup> 1 Dallas, 72.

<sup>6</sup> *Ibid.* 125.

judge.' It is still almost the only rule of legal decision among the Turks and Arabs. Haroun-al-Raschid excelled in it. But in an advanced stage of civilization it is impossible. Its existence in Pennsylvania is very apparent in the leading case of *Pollard v. Shafer* (1787)<sup>1</sup>. The Chief Justice there says, 'A Court of Chancery judges of every case according to the peculiar circumstances attending it, and is bound not to suffer an act of injustice to prevail.' Equity, as a system in itself, with settled and unchanging rules, was apparently neither studied nor appreciated<sup>2</sup>.

The dangers of charging equity to the jury were often felt. 'Before the Revolution,' said Mr. William Rawle, 'when the bench was rarely graced by professional characters, juries were almost the same as Chancellors<sup>3</sup>.' Chief Justice Gibson said in *Lighty v. Short*<sup>4</sup>, 'The greatest practical evil of the doctrine is, that it subjects the contract to the control of a jury, prone to forget that to cut a man loose from his contract from motives of humanity is the rankest injustice.' In his eulogium on Chief Justice Tilghman, Binney calls it, 'a spurious equity compounded of the temper of the judge and of the feelings of the jury, with nothing but a strong infusion of integrity to prevent it becoming as much the bane of personal security as it was the bane of science<sup>5</sup>.' After the Revolution efforts were continually made—notably by Chief Justice Tilghman—to get rid of some of the evils of having the science of equity change with every new jury. The technical doctrines of the English Chancery were studied, and natural equity disappeared. In its reformed condition charging equity to the jury is still the law of Pennsylvania. The judge is the Chancellor, and the jury assist him by deciding on the weight of evidence and finding the facts. The judge may withdraw the case from the jury if satisfied that the testimony, even if believed, is not sufficient to establish the equity. If the jury disregard the equity laid down by the judge, the same remedy exists as when they disregard the law<sup>6</sup>.

The next characteristic to be observed in the Pennsylvania system, is the rule which allows the defendant, in an action-at-law, to plead an equitable defence. This he may do by offering it in evidence (with notice) under the pleas of payment, non-assumpsit, or performance, which have become equitable pleas in Pennsylvania. If his defence does not properly come under one of these pleas he

<sup>1</sup> 1 Dallas, 212.<sup>2</sup> Laureat, Essay Eq. in Pa. 89.<sup>3</sup> Address to the Philadelphia Bar.<sup>4</sup> 3 Pa. 451.<sup>5</sup> 16 Serg. and R. 448.<sup>6</sup> Wharton's note to 1 Dallas, 126; *Peebles v. Reading*, 8 S. & R. 494; *Kuhn v. Nison*, 15 S. & R. 118; *Hawthorn v. Bronson*, 16 S. & R. 269; *De France v. De France*, 34 Pa. 385; *Church v. Rutland*, 64 Pa. St. 432; *Robinson v. Buck*, 71 Pa. 386; *McGinity v. McGinity*, 63 Pa. 38; *Todd v. Campbell*, 8 Casey, 252; *Faust v. Haas*, 73 Pa. 295; *Ballentine v. White*, 77 Pa. 20.



can set it up specially<sup>1</sup>. This method of working equity through common law forms was probably adopted at a very early date. The case of *Swift v. Hawkins* cited above, and decided in 1768, is an instance of an equitable defence admitted under the plea of payment. The court speaks of the custom as one of long existence. It is probable that this method and that of charging the equity to the jury, were the first contrivances for obviating the lack of Chancery powers. Allowing the defendant to set up an equitable defence was soon extended by allowing the plaintiff to rebut it<sup>2</sup>. By such means many opportunities were given in actions-at-law for the consideration of the principles of equity.

The next advance was to allow the plaintiff to begin proceedings by setting out in his declaration a purely equitable right, making the declaration somewhat resemble a bill in equity<sup>3</sup>. This practice was apparently not introduced until a rather late period, when the advancing civilization of the State had made the position of plaintiffs unbearable; for they could make no use of an equity except to rebut one used by the defendant. The first case was in 1791<sup>4</sup>. The plaintiff sued in debt on a bond, but at the trial was unable to make *proferri* because the bond had been lost. A juror was withdrawn by consent and the case went over. The plaintiff then took a rule on the defendant to show cause why the declaration should not be amended by striking out the *proferri* and averring the loss of the instrument. The rule was made absolute, and the plaintiff allowed to amend. The court gave the old reason, that there was no Chancery, and there would be a failure of justice unless some such arrangement were made. This decision was followed by similar ones, until it became a settled rule, that when the common law forms were inadequate, a declaration might be framed setting out the equity of the plaintiff and suited to the circumstances of the case<sup>5</sup>. It is very curious that, in 1789, only two years before this Pennsylvania case, Lord Kenyon made the same decision in England. It was the case of *Read v. Brookman*<sup>6</sup>. Austin cites it as a rare instance of liberal-mindedness in a common-law judge, and also as showing the absurdity of the distinction between law and equity<sup>7</sup>. Unlike the Pennsylvania case it remained solitary and did not become one of the starting points of a new system. So far

<sup>1</sup> Laussat, Essay Eq. in Pa. 66. Allowing the defendant at law to set up an equitable defence was adopted in England by the Common Law Procedure Act long after it had become the custom in Pennsylvania. 17 & 18 Vic. sec. 125; *Royal Society v. Magnay*, 10 Exch. 489.

<sup>2</sup> *McCutchen v. Nigh*, 10 S. & R. 344.

<sup>3</sup> Laussat, Essay Eq. in Pa. 43.

<sup>4</sup> *Commonwealth v. Coates*, 1 Yates, 2.

<sup>5</sup> *Lang v. Keppel*, 1 Binney, 125; *Jordan v. Cooper*, 3 S. & R. 564.

<sup>6</sup> 3 Term Rep. 151. <sup>7</sup> Austin, Jurisprudence, 636.

as appears by the report the English case was not cited in the argument of *Commonwealth v. Coates*.

The equitable rights of the plaintiff received a further extension by the turning of certain well-known common law actions into equitable ones. Thus ejectment became an equitable action, and the plaintiff without a special declaration could recover on a purely equitable title. The exact date of this innovation is unknown; but in the first reported case (1811) it is spoken of as an old custom<sup>1</sup>. The action of replevin was changed in the same way, and made to apply to every case of disputed title to goods<sup>2</sup>. The writ of *estrepment* with the aid of a little tinkering supplied the place of an injunction to restrain waste on land<sup>3</sup>. The foreclosing of mortgages was provided for by statute<sup>4</sup>. When a judgment-at-law was obtained unfairly, instead of resorting to a bill in equity, a rule was taken to show cause why the judgment should not be opened and the party complaining let into a defence on the merits<sup>5</sup>. The assignee of a right of action was always treated as the real plaintiff<sup>6</sup>. To complete the system, equitable rights in land were made subject to the lien of a judgment<sup>7</sup>. And finally, the Orphans Court, which may be described in a general way as a court having control of everything relating to decedents' estates, has always been, so far as its jurisdiction extends, a court with full equity powers<sup>8</sup>.

Such were the methods by which the Courts of Pennsylvania tried to solve the problem that was forced upon them. They dug channels in the barriers of the common law, and through them they attempted to make the waters of equity flow. They succeeded to this extent, that in most law trials, equitable doctrines applicable to the case could be considered. But when it came to remedies, and the practical execution of the doctrines so considered, they signally failed. It is easy enough for a law court to say that it will hear equitable arguments and frame its judgments accordingly. But for carrying out those judgments, the common law method of execution offers no adequate substitute for the equitable proceedings of injunction, specific performance, *quia timet*, and discovery. It is in methods of administration that equity excels the common law, as much as, if not more than, in doctrine. The Pennsylvania law courts were daring enough to usurp the doctrine, but all their

<sup>1</sup> *Hawn v. Norris*, 4 Binney, 78; *Pesbles v. Reading*, 8 S. & R. 484.

<sup>2</sup> *Wester v. Lawrence*, 1 Dallas, 157; *Mead v. Kilday*, 2 Watts, 110.

<sup>3</sup> *Purdon's Digest*, 1465; *Byrne v. Boyle*, 37 Pa. St. 260.

<sup>4</sup> *Purdon's Digest*, 482.

<sup>5</sup> *Mitchell*, *Motions and Rules*, 76.

<sup>6</sup> *Steele v. Phoenix Ins. Co.*, 3 Binney, 312.

<sup>7</sup> *Anwerter v. Mathiot*, 9 S. & R. 402.

<sup>8</sup> *Laussat*, *Essay Eq.* in Pa. 105; *Purdon's Digest*, 1103.

ingenuity could not obtain for them the practical remedies. Of course in many cases where equitable principles were applied, the common law method of damages and execution was enough; and if the defendant set up an equity which defeated the plaintiff, that ended the matter. But whenever specific performance was necessary, the only way of enforcing the equity (except in the cases of ejectment and replevin already mentioned) was by conditional damages. Thus in *Clyde v. Clyde* (1791), the plaintiff's right to a watercourse was disturbed by the defendant. The judge charged the jury to award large damages, and the plaintiff's attorney agreed to release them when the defendant should give a secure grant of the watercourse<sup>1</sup>.

The sum of the whole matter is, that the courts contrived, by special declarations, pleas, &c., to bring up for consideration in law trials, the doctrines of equity; and they succeeded in partly administering those doctrines, in some cases by the ordinary common law methods, in others by conditional damages, and in others by such actions as ejectment, replevin, *estrepment*, rule to open judgment, &c., which they themselves invented or the Legislature invented for them. Here they stopped. They squeezed equity part way into the common law; but it would not go all the way. The whole subject of preventive justice was left outside. They never found a common law substitute for injunctions, bills *quia timet*, or discovery. Without these the administration of justice would in modern times be at a standstill.

Pennsylvania was not the first place where equity was administered through common law forms. The idea is said to be as old as the Year Books; and here and there in the common law isolated instances of it can be found. The law of bailments is in great part equitable; so is the action of *assumpsit* for money had and received; and the doctrines of relief from the penalty of a bond, of contribution among sureties, of discharge of the surety, by giving time to the principal, are all instances of equity administered at common law. There are also certain old and almost obsolete actions, which accomplish very much the same result as a bill in equity. The writ of *audita querela* prevents the improper enforcement of a judgment, the writ of *estrepment* prevents waste, *warrantia chartae* prevents a suit for land by any action in which the defendant cannot call on his warrantor, *curia claudenda* compels the owner of land to enclose it, *ne injusti vexes* prevents unfair distraint<sup>2</sup>.

<sup>1</sup> 1 Yates, 92; Anon., 4 Dallas, 147; *Walker v. Butz*, 1 Yates, 575; *Moody v. Vandye*, 4 Binney, 43; *Kauffelt v. Bower*, 7 S. & R. 81.

<sup>2</sup> Co. Litt. 100, a.

These and many other examples were often cited by Pennsylvania lawyers to show that the good old common law was equal to every emergency and all the principles of equity could be administered in it<sup>1</sup>. Laussat in his famous essay developed this point ingeniously. He proposed to revive the ancient writs, and if the courts were not bold enough to strip them of their technical absurdities, to persuade the Legislature to do it. In all cases which could not be covered by these writs or by the methods already in vogue, he suggested that the writ of *scire facias* be used<sup>2</sup>. He argued, that as there was no act, from the performance of which a party could not be called upon to show cause why he should not be enjoined, and as the writ allowed of the joining of all parties interested, there was no reason why writs of *scire facias* should not become complete substitutes for bills in equity. As a substitute for bills of account he offered to reform the old common law action of account render.

But neither the Legislature nor the courts followed these suggestions. The Pennsylvania system remained as it was, partly successful, yet unable to supply the needs of an active commercial state. Still there were those who loved it, and, when it was called a 'bungling substitute' or an 'hybridous monster without the virtues of either parent,' their wrath was kindled. Said Chief Justice Black in *Finley v. Aitken*<sup>3</sup>, 'I think it not an ignorant prejudice, but high political wisdom, which caused our ancestors to refuse a Court of Chancery any place among their judicial institutions. . . . The administration of law blended and mixed with equity principles was a happy conception. It was no "bungling substitute," but a most admirable improvement of both legal and Chancery practice. . . . It is to be fervently hoped that we will not now extinguish the light by which the world has been walking.'

To this day there are good lawyers in the State who maintain that the Act of 1836, giving equity power to the courts, was unnecessary. It could have been dispensed with, they say, if the judges had only been a little more pliant and ingenious. Certainly it must be admitted, that, if we could have done without it, our State would stand alone in the juridical honour of having demonstrated that the distinction between law and equity is an absurdity. But the fact is otherwise. The people tried to do without equity, and after many attempts and more than a hundred years of consideration found that they could not. There is of course always the chance that the majority may be wrong. But the majority in

<sup>1</sup> An *Assize of Nuisance* as a substitute for an injunction was brought in Pennsylvania in 1809. *Lirezey v. Gorgas*, 2 Binney, 194.

<sup>2</sup> Laussat, Essay Eq. in Pa. 126, 139.

<sup>3</sup> 3 Pittsburgh Leg. Journal, 2.

this case agreed with all the other majorities which have had to decide the same question.

Writers on jurisprudence tell us that our distinction between law and equity is illogical and unnecessary; judged by scientific principles it should not exist; that wherever equity appears, whether in Rome or in England, it is merely an historical accident; it is unknown in France, and would be unknown to us, if it were not for certain peculiar circumstances attending the infancy of our system. But on the other hand, it must be admitted that law, though in part composed of logical reasoning, is also a thing of growth, influenced by custom and individual opinions. If it has taken for itself a certain method of formation, it is in vain that you ignore or try to eradicate that method. The experience of Pennsylvania is a proof that equity, though unscientific, is in our law necessary and vital. It may make an unreasonable distinction; but still it is a form which the law has assumed, and to try to cut it out or join it to something else, is very much like attempting similar improvements on the human body. The modern codes, which turn all forms of action into one, have not been able to abolish the distinction. No code has ever enacted an abridgment of equity's principles; but, on the contrary, they are always adopted entire. It baffled the astuteness of the Pennsylvania judges to find a substitute for the preventive remedies of equity. The codes have met with no better success, and have taken injunctions, *quia timet* and the rest, with changed names perhaps, but without diminishing or adding aught in substance<sup>1</sup>. The great Mansfield thought he could amalgamate law and equity; and men not so great as he have had the same dream. But they are all alike in failure. Pennsylvania's attempt shows how far the distinction is meaningless and how far it is to be respected. The doctrines can be combined with legal forms, but not the remedies.

In 1830 the Legislature appointed a commission of three to revise the whole civil law of the State. These three men deserved well of the Commonwealth, and the eight reports they submitted to the Legislature remain as an everlasting monument to their skill. In no respect did they show themselves to better advantage than when they came to the vexed question of courts of equity. They were able lawyers and knew exactly what the Pennsylvania system was worth; and they had made up their minds that it was not equal to supplying the wants of the people. But being wise in their generation, they were careful to heap on it lavish praises, to call it a combination of all that was good; at the same time

<sup>1</sup> Bispham, *Equity*, sec. 14.

they thoroughly analyzed it, and quietly suggested that full Chancery powers be given the law courts in the following cases:—

(1) trustees, (2) trusts, (3) control of private corporations, unincorporated societies and partnerships, (4) discovery of facts material to any case, (5) interpleader, (6) injunction, (7) specific performance.

This included nearly the whole jurisdiction of Chancery, and was a severe commentary on the Pennsylvania system. The Legislature could swallow only part of it. In 1836 they gave to the Courts of Philadelphia alone all the equity jurisdiction suggested by the commissioners. To the rest of the State they gave jurisdiction only in the first three cases above mentioned.

But the ice was broken. In 1840 Philadelphia got Chancery power in cases of fraud, accident, mistake and account; and the rest of the State in cases of account. In 1844 Allegheny county got the same jurisdiction as Philadelphia. In 1845 Philadelphia was given equity power in dower and partition. And so it went on from one point to another until in 1857 the equity jurisdiction was made the same throughout the State. Since then and up to the present time there have been other, but less important, grants. In one or two of them Philadelphia has shown that she still possesses her ancient and superior influence with the Legislature<sup>1</sup>.

This legislative grant does not interfere with the administration of equity through common law forms<sup>2</sup>. That system continues to exist, and is used whenever the occasion requires it. It has served and still serves a useful purpose. It was the result of hard necessity, and under the circumstances that attended the early days of the State no better arrangement could have been made. If it has failed of complete success it is a failure in attempting great things.

SYDNEY G. FISHER.

<sup>1</sup> Rawle, *Essay Eq.* in Pa. 70; Purdon's Digest, 589; Sixth Rep. of Com. to Rev. Civil Code.

<sup>2</sup> *Aycinema v. Peries*, 6 W. & S. 243; *Biddle v. Moore*, 3 Pa. 161; *Church v. Euland*, 64 Pa. 432; *Corson v. Muleony*, 49 Pa. 88.

## ON THE LIMITS OF RULES OF CONSTRUCTION.

**T**HE question that I propose to discuss in this paper, namely, how far a decision on the construction of one instrument is an authority on the construction of another, has received much attention of late years. Two opposite views are held, some lawyers consider that a decision on construction is so sacred that it must always be followed, under the penalty of throwing the whole subject into confusion, while others think that decisions on construction are useless—'you cannot construe one man's nonsense by another man's nonsense.'

I suppose that men who hold the extreme views that I have mentioned rarely adhere to them in practice. Men of the one school sometimes decline to follow a reported case, while men of the other school are apt to read the reported cases for the purpose of aiding them in coming to an opinion. I shall endeavour to shew that both these views are incorrect; that while on the one hand a decision on an isolated case is of very little assistance, on the other hand, where we find a catena of cases always putting the same construction on similar words occurring in an instrument of a particular class, we can deduce a rule from them for the construction of similar words occurring in an instrument of that class.

Almost every word in the language may bear more than one meaning, for instance 'unmarried' may mean 'never having been married' or 'not under coverture;' 'children' which generally means 'descendants in the first degree' may mean 'grandchildren' or 'great grandchildren:' the problem in every case of construction is to ascertain in which of its possible meanings the word is employed.

Three rules are used by lawyers for the purpose of ascertaining this meaning, and as they are used by lawyers they may be called rules of law, but the reader who has fully grasped the meaning of the rules will perceive that they exist independently of law, that they will lead us to the required result, and that no other rules will enable us to discover the meaning in which a word is used, in other words that they are necessary and sufficient rules for the purpose. The reader who is curious on the matter will find a somewhat imperfect attempt to deduce these rules from first principles in the author's 'Introduction to Conveyancing,' 3rd edit. p. 29.

The rules are the following:—

*First.* When the words used in an instrument are in their

primary meanings unambiguous, and when such meanings are not excluded by the context and are sensible with respect to the circumstances of the parties to the instrument at the time of execution, such primary meanings must be taken to be those in which the parties used the words.

*Second.* Extrinsic evidence is admissible for the purpose of determining the primary meanings of the words employed and for no other purpose whatsoever.

*Third.* Where the primary meaning of a word is excluded by the context, we must affix to that word such of the meanings that it may properly bear as will enable us to collect uniform and consistent intentions from the whole instrument.

In these rules, by primary, sometimes called literal, meaning is intended not necessarily the primary etymological (i. e. literary or dictionary) meaning, but either (1) the meaning usually affixed to the words at the time of execution by persons of the class to which the parties to the instrument belonged, or (2) the meaning in which the words must have been used by the parties having regard to their circumstances at the time of execution, or (3) the meaning which it can be conclusively shown that the parties were in the habit of affixing to them.

It follows that the primary meaning of a technical word in an instrument relating to the art or science to which it belongs is its technical meaning; thus in a legal document, wherever a word occurs which in law bears a technical meaning, that technical meaning, and not the popular meaning, if any, is the primary meaning for this purpose.

There is yet another rule used for the purpose of resolving equivocations, or as they are sometimes called, latent ambiguities; but it is not necessary to consider this rule for our present purpose.

At first sight it would appear that the existence of the first rule renders the existence of a rule of construction impossible. Persons who execute legal instruments are of all possible classes; their circumstances differ most widely; and they may habitually use words in different meanings.

A clergyman and a barrister are persons of different classes. They habitually use some words, such as conversion or election, in different meanings. When the clergyman is preaching a sermon and the barrister addressing a judge, their circumstances are so different that it is hardly possible that they can use the words in the same meaning.

But their circumstances might be such that they used the words in the same meaning; the barrister might use them in their



theological meaning if he were arguing a case of heresy, and the clergyman would use them in their legal meaning in his will.

It may be objected that I have taken an example of technical words used in a different sense by the same person under different circumstances, and that, although if the parties to a legal instrument use words which bear a technical meaning in law they must be assumed to have used them in that meaning, it by no means follows, if they use words which do not bear a technical meaning, that they both or all use them in the same meaning.

The answer appears to be that parties to the same instrument are temporarily in the same circumstances and must be assumed to have used the words in the same meaning. Otherwise they would not have been *ad idem*. I suppose that there may be cases in which on proof that the parties meant, in perfect good faith, different things by the words that they concurred in using, the instrument would be wholly inoperative; but this would be a rare and anomalous event.

How are we to find out the meaning in which any word is used in a legal instrument where there is nothing special in the circumstances of the parties? We may enquire in what meanings the same words have been used in similar instruments; in other words we may look at reported cases on the construction of similar instruments, and if we can find a sufficient number of decisions to make us fairly certain that we are correct, we arrive at a rule for the construction of that word as occurring in an instrument of a certain class.

It will be observed that a rule of this class for the construction of a word in an instrument of one nature is no authority for the construction of the same word occurring in an instrument of a different nature, because the circumstances of the parties are necessarily different. For instance the word 'unmarried' occurring in the provisions made by a father in his will for an unmarried daughter, conditional on her being 'unmarried' at a certain time, means 'being a spinster;' but the same word occurring in the phrase 'if she shall die unmarried' in the ultimate trusts of a lady's fortune in her marriage settlement, the only objects of which are to exclude the husband's marital right, means 'not under coverture.'

Rules of the class above pointed out present but little difficulty in their application. The only questions to be considered are, does the alleged rule exist, and is it excluded by circumstances or the context?

The simplest case of the application of the third of the fundamental rules is where an interpretation clause is employed. A

testator uses the words 'my trustees' all through his will, and explains that by 'my trustees' he means '*A* and *B* and the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will.' Cases of this sort present no difficulty.

Cases occur however where the instrument contains inconsistent clauses, they arise from the draftsman not having had sufficient clearness of mind and brilliancy of imagination to perceive the facts existing and future that have to be provided for, or from his not being a master of the English language, or from his ignorance of the law. A common instance of this occurs in a will drawn by an ignorant person who uses 'issue' where he means 'children,' and then by a reference to the parents of the 'issue' shows that by 'issue' he means 'children.' Again proportions provided for children are divested on their deaths 'before their shares become payable,' where the context shows that what is meant is 'before their shares become vested.'

At first sight it may seem that cases of this nature fall under no rules, that you cannot construe one man's blunder by another man's blunder, we find however that there is a startling uniformity in error: the same words are omitted, the same superfluous words are inserted, and the same word is substituted for another, over and over again.

Where we find the same blunder repeated time after time in an instrument of the same nature, and the same construction placed upon it by the court, the conclusion is irresistible that that construction is correct: in other words we arrive at a rule of construction.

It may be objected that the blunder may occur in an instrument where the circumstances of the parties are different from those in the reported cases, and that the context of the instrument under consideration may differ from those that have received judicial construction. This objection does not affect the validity of the rule, it only alters the manner of expressing it. A rule of this nature may always be expressed as follows:—'Where a phrase *A* occurring in an instrument of a certain nature may mean *B* or *C*, and the phrase *D* occurs in the same instrument, *A* must be taken to mean *B*, unless the circumstances of the parties or the context of the instrument render that meaning impossible.'

There is considerable difficulty in the application of rules of this nature, for it often happens that the phrases which occur in the instrument under consideration are not absolutely identical with those that are found in the reported cases, so that even if we can deduce a rule from the decisions, the question arises, do the words

of the instrument fall under the rule? Nothing but an educated judgment will enable the practitioner to determine whether the rule can be safely applied.

For example, it is a well established rule that where, by a marriage settlement, portions are provided for the younger children of a marriage, or personalty is settled on parents for life and afterwards on their children, and the children's shares are made payable as to sons at twenty-one and as to daughters at twenty-one or marriage, the settlement will if possible be so construed that every child on attaining twenty-one, or being a daughter on marriage becomes indefeasibly entitled to a share, whether it survives its parents or not. In a settlement of this nature there are two sets of clauses to be considered, the clauses of gift to the children and the clauses of gift over to others upon failure of the children; if both these clauses are clearly and unambiguously expressed they may exclude the rule. But the most minute inaccuracy in either clause, such that they do not quite fit each other, has been held sufficient to admit the rule. See the cases collected 3 *Dav. Prec.* 428; *Elphinstone Norton and Clark 'On Interpretation,'* 397.

It has been held that the rule applied where there was a gift over before the children's shares were 'assignable,' and a practitioner who was aware of this might feel very great difficulty in determining whether the rule applied (as in fact it does) where the gift over was before the share was 'payable;' for 'assignable' might mean either assignable to or assignable by the child, while 'payable' could only mean payable to the child.

The reader who agrees with me in the conclusions that I have endeavoured to draw, will see that, owing to the difference between the circumstances of a testator and those of a party to a deed, we cannot say that rules for the construction of wills are applicable to deeds and *vice versa*. It sometimes happens that the circumstances are so nearly the same that the same rules apply, as for instance in the case of the rules as to portions charged on land, but in the absence of direct authority to that effect it is not safe to apply a rule for the construction of deeds to a will, or a rule for the construction of wills to a deed.

HOWARD W. ELPHINSTONE.

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## OFFENCES AGAINST MARRIAGE AND THE RELATIONS OF THE SEXES.

**T**HE science of comparative jurisprudence, in the sense in which it is distinguishable from historical jurisprudence, is as yet in its infancy. Leibnitz projected a scheme for tabulating the laws of all the countries of the world, and showing their correspondence and differences in parallel columns; but the scheme was never carried out; and since then very little has been done for the comparison of laws, except in connexion with history. Comparative criminal jurisprudence in particular has received scarcely any practical treatment or concrete illustration, a fact which becomes painfully manifest whenever any new or remedial criminal legislation is taken in hand. A knowledge of the laws of other civilized countries is as essential for the lawyer and the legislator as for the jurist, philosopher, or moralist; and there can be no doubt whatever that, had our statesmen and legislators possessed but a moderate acquaintance with such laws, some few sections at least of the recent Criminal Law Amendment Act would have found a place on the Statute Book long ago, while others could never have been passed at all. Both inside and outside the House of Commons the discussions on the Bill were characterized by considerable misapprehension as to remedies which already existed under English law, and by a truly abysmal ignorance concerning the provisions of Continental and American law *in pari vel simili materia*.

**I. ADULTERY.** A few years ago a judge of the highest appellate court in one of the Provinces of British India, while reducing a sentence passed by a subordinate court for the offence of adultery, actually remarked from the bench that such prosecutions were to be deprecated, as adultery *did not constitute a criminal offence in the civilized countries of Europe!* Livingston has remarked, in his Introductory Report to the Louisiana Code of Crimes and Punishments, that he believes England to be the only country in which adultery is *not* a criminal offence. The State of New York appears to be an exception, as the criminal codes of that State were drawn up on the basis of English law. In France, both the wife and her accomplice are punishable with from three months' to two years' imprisonment, while the latter is liable, in addition, to pay a fine of from one hundred to two thousand francs. The husband is not punishable for simple adultery, but he may be prosecuted, on the

complaint of his wife, for keeping a concubine in the conjugal house, the penalty being a fine of from one hundred to two thousand francs; in Belgium he is further liable to imprisonment for from one month to one year<sup>1</sup>. Since the passing of the new Divorce Act, the French Government will probably have to make its action consistent by making the husband as well as the wife punishable for simple adultery. In Germany<sup>2</sup>, adultery which has led to divorce is punishable with six months' imprisonment, both the guilty person and his or her accomplice being liable to prosecution. In India<sup>3</sup>, the man who commits adultery with the wife of another is punishable with five years' imprisonment and fine; *but the wife cannot be punished as an abettor*. Here, then, are some striking differences, which afford ground for thought and discussion. Does it conduce to a people's well-being to make adultery a criminal offence? Does such a measure establish marital happiness on a surer and more secure basis? In India there can be little doubt that it does, and the penal sections are quite in accord with native opinion. The only matter for regret is the uncertainty with which these sections are worked, many European magistrates being loth to press them. Their action would probably be different, were it generally known that England is almost the only country in which adultery is not penal.

Adultery has been punishable in almost all ages and countries. In ancient times it was punished with the most extraordinary severity. By the law of Moses<sup>4</sup> both the offenders were stoned to death. According to the laws of Manu, the adulterous wife was to be devoured by dogs in a public place, and the adulterer burned slowly to death on a red-hot iron bed. According to some other Hindu books, the adulterer was mutilated and led naked through the streets mounted on an ass. By the ancient laws of England the nose and ears were cut off<sup>5</sup>; and even in more modern times the punishments inflicted by the Ecclesiastical Courts have been extremely severe, a fine of £500 being a common penalty. In one case a woman was fined £2000 'for notorious adultery<sup>6</sup>.' Indeed, these courts appear to have exercised a sort of general supervision over morality akin to the censorship still exercised by caste panchayets in India. For instance, we read<sup>7</sup> that Augustine Moreland of Stroud was fined £500 for 'excessive drinking, swearing most desperate oaths, and blaspheming the name of God.' Sir James Stephen has remarked that this jurisdiction was so extensive that

<sup>1</sup> French Penal Code, 336-339; Belg. P. C. 389.

<sup>2</sup> German Penal Code, 172.

<sup>3</sup> I. P. C. 497.

<sup>4</sup> Lev. xx. 10; Deut. xxii. 22.

<sup>5</sup> *Anc. Laws of Eng.* 174. [The severe penalties of early law-books are often evidence of what the promulgators—kings, clerks, or Brahmins—would have liked to see done, rather than of what was actually done: but even that evidence is valuable. Bracton mentions a clerk at Oxford who was burnt for that 'apostatauit cum quadam Judaea.'—Ed.]

<sup>6</sup> Calendar of State Papers, 1633-34, p. 418.

<sup>7</sup> *Ibid.*, 1634-35, p. 330.

the courts even interfered sometimes in quarrels between married people. Thus 'Nicholaus Elyott notatur officio quod non tractat Margaretam uxorem suam maritali affectione.' Many neighbours on both sides were called, and at last the husband was required to show cause why he should not be excommunicated. Indeed, the court extended its protection even to a mistress. John Ball not only lived in adultery with Margaret Sanfield, but said to her at last, 'If I see the speke eny more with him, I shall kutt of thi nose,' 'praetextu quorum verborum predicta Margareta est extra se jam posita et totaliter demens effecta.'

No abuse need necessarily result from the penalising of adultery, enticing away married women, and kindred offences, for the Legislature can always impose proper safeguards and restrictions. In France no evidence is permitted except *flagrant délit* and written correspondence. 'That Roman law,' says Montesquieu<sup>1</sup>, 'which required the accusations in cases of adultery to be public, was admirably well calculated for preserving the purity of morals; it intimidated married women as well as those who were to watch over their conduct.' In another place<sup>2</sup> Montesquieu writes: 'The establishment of monarchy and the change of manners put an end to public accusations. It might be apprehended lest a dishonest man, affronted at the slight shown him by a woman, vexed at her refusal, and irritated even by her virtue, should form a design to destroy her. The Julian law ordained that a woman should not be accused of adultery, till after her husband had been charged with favouring her irregularities; which limited greatly, and annihilated, as it were, this sort of accusation.' In India a false charge is occasionally instituted by some man whose concubine has run away from him; but as evidence of reputation is excluded<sup>3</sup> in prosecutions under sects. 494, 495, 497, and 498 of the Indian Penal Code, and the fact of marriage has to be strictly proved, the falsity of such charges is easily detected. Hindoo husbands are not by any means too ready to institute prosecutions, which cover them with shame, and often cause their degradation from caste. Sometimes, when an adulterer is caught in the house, a brass utensil of some sort is tied in his cloth, the village watchman is summoned, and a charge is made at the police-station of lurking-house-trespass *with intent to commit theft*. The fact that the native police send up such cases as theft, though their investigation must have made them aware of the real facts, shows the direction in which their feelings and sympathies lie. Such charges are sometimes made even when the woman is a *widow* living as a member of a joint Hindoo family.

<sup>1</sup> Spirit of Laws, v. 7.<sup>2</sup> Ibid. vii. 11.<sup>3</sup> Ind. Evid. Act. s. 50.

Courts can only take cognizance of offences under sects. 497, 498<sup>1</sup> of the Penal Code on the complaint of the husband<sup>2</sup>; and if the latter persists in charging theft, and conceals the real facts, a magistrate has no alternative but to discharge the accused. No doubt shame and fear of being outcasted constitute the principal motive for this *suppressio veri et suggestio falsi*; but it is probable that the Courts are in some respect to blame in discouraging *bond fide* complainants, and that the allegation of theft is partially due to the difficulty of procuring a conviction for the real offence. Unwillingness on the part of the judiciary to administer the law as it stands (no matter what their private opinion may be) can only lead to disastrous results. Those who do not know native society may suppose that husbands and wives are not likely to care for one another, married as they are when quite children. But this is not the case. Speaking generally, the Bengalee thinks there is no woman like his wife. The latter goes to her husband immediately she arrives at the age of puberty, and for a nubile daughter not to be married is an indelible disgrace to her parents. Celibacy is a rare anomaly, the result of religious vows, and seldom or never due to poverty. The married state is looked upon as a sacred bond, rendered necessary by the Hindu religion<sup>3</sup>, and any attempts to destroy its happiness and security are regarded with extreme indignation both among the educated and uneducated classes. The repeal of the penal sections would virtually teach the people to be immoral, and, in the present state of Hindu society, would have the most disastrous results. The jealousy of the East arises not from love only, but from customs, manners, and laws, and even from religion. Such jealousy may be cold, and even joined with indifference and contempt, but it is always terrible, and thirsts for revenge. Already, in many cases, injured husbands or relations take the law into their own hands. If there were no law to resort to, crimes of violence would increase a hundredfold.

II. BIGAMY. The elements which go to make up the offence of bigamy must necessarily be almost identical in all countries. Still, as regards the question of intention and extenuating circumstances, the decisions of various Courts exhibit some striking differences. Neither in England nor in India does the law apply to any person, whose former husband or wife shall have been continually absent and not heard of for the space of seven years. But, though seven years have not elapsed, there may still be a *bond fide* belief that

<sup>1</sup> Adultery and enticing, taking away, detaining married women with illicit intent.

<sup>2</sup> Crim. Proc. Code, 199.

<sup>3</sup> The word for son is *putra*, i. e. he who delivers from hell (*pus*). If a man has no son of his own, he must adopt one.

the first husband or wife is dead; and Sir James Stephen, in his Digest of Crimes, suggests that a person may not be guilty under such circumstances. The proviso in 24 and 25 Vict. c. 100. s. 57 merely enacts that a second marriage, after seven years' ignorance as to the life of the first husband or wife, shall not be criminal. But it does not say that re-marriage within such period must under all circumstances be criminal. Lolly's case<sup>1</sup> appears to be a hard one. He was assured by several lawyers that his divorce was valid, married again, was tried for bigamy and convicted. The judges administered the law as they found it, and therefore do not deserve the fierce and intemperate denunciation with which Mr. J. G. Phillimore has visited them. Still it may be doubted whether the riper jurists of to-day would not show a greater consideration for ignorance of positive law<sup>2</sup>, especially if it is at all ambiguous or difficult to ascertain. Lolly got his divorce from the commissary or consistorial court of Scotland, and it had been actually held that even a divorce *a mensa et thoro* in England was sufficient to bar a prosecution for bigamy<sup>3</sup>. In America the decisions of the Courts have been more just and liberal, and the Statute Law itself is not so rigorous. The period of absence is five years only, and no person, whose former husband or wife has been sentenced to imprisonment for life, can be punished for marrying again<sup>4</sup>. The new Divorce Act in France includes a 'severe criminal sentence' among the grounds for divorce. Mr. Lewis, in a recent article in the Fortnightly Review, has urged that the insanity of the husband or wife for a period of two years or a sentence of five years' penal servitude passed against either should be a ground for divorce. The sections of the Louisiana Penal Code<sup>5</sup> relating to bigamy seem to embody in clear and happy terms the suggestions of Sir James Stephen alluded to above. 'A person, having a wife or husband living, who shall, *without having a reasonable cause to believe such wife or husband to be dead*, contract a second marriage, is guilty of bigamy. Absence of first wife or husband for five years without intelligence is to be considered a reasonable belief of death.' The absence without intelligence is mentioned only as an illustration or example. In a case in Cali-

<sup>1</sup> *E. v. Lolly*. R. & B. C. C. R. 237.

<sup>2</sup> A man must be a good jurist as well as a good lawyer to make a good criminal judge. Such a maxim as *ignorantia legis seminem excusat* cannot be sweepingly applied. Grotius has well remarked in *De Jure Belli et Pacis*: '*Ignorantia legis sicut, inevitabilis si sit, tollit peccatum, ita cum aliquâ negligentia conjuncta delictum minuit.*' It requires a fine discrimination and profound knowledge of the civil law to determine in what cases and to what extent intention may properly be ignored.

<sup>3</sup> This doctrine was questioned in *Porter's Case* (Cro. Car. 461), but the point was settled (1 East, P. C. c. 12). Lolly's prosecution was under Statute 2 Jac. I. c. 11, which has been since repealed by 9 Geo. IV. c. 34.

<sup>4</sup> N. Y. P. C. 299.

<sup>5</sup> Lou. P. C. 577, 578.



fornia<sup>1</sup>, it was held that there could be no conviction for bigamy where the evidence as to the first wife showed only that she was alive three years before the second marriage. It seems to have been held that the lapse of three years was sufficient to shift on to the prosecution the onus of proving that the defendant had reason to believe his wife to be alive. This decision was perhaps unduly favourable to the defendant.

In India, customary law has to a great extent been ignored, and some Bombay decisions<sup>2</sup> in particular have ridden rough-shod over the well-ascertained customs of the lower classes. Treatises on personal law relate only to the higher classes, among whom divorce is unknown or unrecognized; and these principles have been ruthlessly applied to all classes, and even to semi-Hinduized aborigines. For instance, it has been held that a caste panchayet has no right to permit a woman to re-marry during the lifetime of her husband, whereas such re-marriages are under certain circumstances permissible. It appears harsh to punish parties for acting in accordance with the fiat of the only tribunal to which they have access, and the Calcutta High Court have at length recognized this fact<sup>3</sup>. When the husband refuses to give a *chor-chitti* (release), it is very common for the caste panchayet to assemble and to permit the woman to re-marry, the ground generally being the impotency or incurable disease of the husband, sometimes his being a convicted thief and notorious *budmask* (bad character), and sometimes wilful and continued desertion and neglect to maintain. It may be remarked that impotency was a *canonical* disability under the former English law, a ground for divorce *a vinculo*, regarded as necessary *pro salute animarum* (1 Bla. Com., 440); and under the new Divorce Acts, a decree of *nullity of marriage* may be obtained from the Court on any ground which would have formerly justified the Ecclesiastical Court in granting a divorce *a vinculo* (Steph. Com. ii. 298). The lower classes have no Divorce Acts to refer to or Courts to resort to, and the jurisdiction of panchayets in social and religious matters should be treated with some consideration; indeed, in the absence of malice or improper motives, their decisions should not be impugned.

III. It may be useful to note some other offences against the relations of the sexes in connection with the recent Criminal Law Amendment Act<sup>4</sup>; and it may be premised that in some respects the Act does not go far enough, while in others it goes too far. The sins of omission appear to be due to the misdirected agitation

<sup>1</sup> 58 Cal. 218.

<sup>2</sup> 2 Bom. H. C. 124; 10 Bom. A. C. 381; 1 L. R., 1 Bom. 347.

<sup>3</sup> 7 C. L. R. 354.

<sup>4</sup> 48 and 49 Vict. c. 69.

against a class, who are not responsible for the evils complained of. The causes of the evils are deep-rooted, and exist almost exclusively amongst the lower classes, a fact which was pointed out by Sir William Harcourt in the House of Commons. The lower classes have been led to believe that their daughters require greater protection against the rich; but, when the clouds of passion and prejudice have cleared away, it will be seen that it is against themselves that they require protection. I may instance two phases of immorality, which are rife among the lower classes,—each a very ‘*fons et origo malorum*’; and yet they have been left untouched by the new Act:—

1. Seduction under promise of marriage.
2. Incest.

Incest is notoriously due to overcrowding among the poor, while seductions among domestic servants and shop-girls are effected by men of the same position as themselves. Surely the best way to drive young girls off the streets is to remove these glaring and palpable causes of their being there. It may do more harm than good to punish certain effects without rendering penal the radical causes which produce such effects. The evils complained of are partly the result of causes beyond the reach of legislation, but the above-mentioned phases of immorality are well within its reach, and should have been rendered penal.

#### *Incest.*

‘The only reason,’ says Sir James Stephen, ‘which I can assign why incest in its very worst forms is not a crime by the laws of England is that it is an ecclesiastical offence, and is even now occasionally punished as such. It is, I believe, the only form of immorality which in the case of the laity is still punished by ecclesiastical courts on the general ground of its sinfulness.’ Every person who commits incest, adultery, fornication, or any other deadly sin (not punishable at common law), is liable, on conviction in an ecclesiastical court, to do penance, and to be excommunicated, and to be imprisoned for six months<sup>1</sup>. Archdeacon Hale mentions the following as offences cognizable by the ecclesiastical courts, *incest*, *bigamy*, *acting as a procuress*, procuring abortion, and over-laying children. Incest is the only offence which is ever prosecuted in these days, and that very rarely. As the ecclesiastical jurisdiction has become almost obsolete, and will soon be entirely so, the worst forms of incest should be declared penal by the statute-law. Sec. 302 of the New York Penal Code enacts

<sup>1</sup> 13 Edw. I. c. 4; 53 Geo. III. c. 127. ss. 1-3. See also Phillimore's *Ecc. Law*, 1081, 1442.

that 'when persons, within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by imprisonment for not more than ten years.' The *Pall Mall Gazette*<sup>1</sup>, speaking of the corruption of girls under thirteen, says 'it is most prevalent in the overcrowded quarters of large towns, *where it is very often complicated with incest.*' It is to be hoped that some improvement may be effected by the Act for the Housing of the Working Classes (48 & 49 Vic. c. 72).

*Seduction under promise of Marriage.*

Livingston remarks, in his Introductory Report to the Code of Crimes and Punishments for Louisiana: 'Seduction is not, I believe, punishable in England, unless preceded by a conspiracy. Yet, if we consider the base profligacy of the act, by which the most implicit confidence is destroyed, and the most solemn promises are deliberately broken, not only to the utter ruin of the unsuspecting victim, but to the disgrace and misery of her connexions, it is one in which the immorality of the act and the misery it inflicts both require exemplary punishment.' Sec. 342 of the Louisiana Penal Code punishes the seduction of a woman of *good reputation under promise of marriage*. Sec. 284 of the New York Penal Code enacts that 'a person who, *under promise of marriage*, seduces and has secret intercourse with an unmarried female of *previous chaste* character, is punishable with imprisonment for not more than five years or with fine not exceeding 1000 dollars or both.' The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offence, is a bar to a prosecution. In Germany, the seduction (no promise of any sort necessary) of a chaste girl under the age of sixteen years is punishable with one year's imprisonment<sup>2</sup>. The Criminal Law Amendment Act has overstepped the bounds of sound legislation in rendering penal the mere act of connexion with a girl under sixteen years of age, though such girl be of known immoral character, and may have been the actual seducer. But all right-minded men will agree that the seduction of a chaste girl *under promise of marriage* should be made a criminal offence. Such seduction could actually be punished in India as cheating<sup>3</sup>. But sec. 3. (2) of the new Act will not cover such a case.

<sup>1</sup> Pamphlet—Vigilance Committees and their work, p. 22.

<sup>2</sup> Germ. P. C. 182.

<sup>3</sup> Sec. 415, Indian Penal Code: 'Whoever, by deceiving any person . . . or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat.' To induce a Brahman to marry a woman of low caste, by representing her to

In England false pretences and false representations do not in law cover false promises to perform some act in the future: it is necessary that they should relate to some existing fact. Of course some such restrictions should be imposed as to prevent the institution of false charges. In New York<sup>1</sup>, for instance, no conviction can be had for seduction upon the testimony of the female seduced, if unsupported by other testimony; and it has been ruled that the corroboration must be as to promise and intercourse, not as to chastity or being unmarried<sup>2</sup>.

The principal provisions of the new Act are as follows:—

1. It is felony to have unlawful connexion with girls under thirteen.
2. It is a misdemeanour to have unlawful connexion with girls between thirteen and sixteen.
3. It is a misdemeanour to abduct a girl under eighteen.
4. It is a misdemeanour to procure for illicit intercourse a girl under twenty-one, who is not of known immoral character.

With regard to the first two offences, it appears from police reports in the newspapers that the lower classes are already receiving a very rude awakening. Indeed, Vigilance Committees will find they will have more than they can do, if they hope to cleanse the Augean stable of the East-end of London, where juvenile immorality is due to deep-rooted social evils. As regards the corruption of girls between thirteen and sixteen, it appears quite possible that a reign of terrorism may spring up. Common prostitutes under sixteen will be able to extort money from men who have had intercourse with them. It may be said that girls under that age should and will be avoided; but in many cases girls over sixteen may falsely understate their age, and extort money under a threat to bring a case. The mere threat of publicity will generally suffice. Again, no father will employ girls under sixteen where there are young boys in the house. A corrupt domestic servant may not only seduce her master's son, but may add insult to injury by levying blackmail. These girls will find it far more difficult to get employment. It is no doubt very advisable that all girls under sixteen should be taken off the streets; but the question is how the rescue societies are to provide for them in the present state of the law. Their accession to the ranks of the Salvation Army will not tend to enhance the already exceedingly doubtful reputation of that body.

The section as to the abduction of girls under eighteen is not open

be a Brahman, would amount to cheating, even though no money should be paid in consequence of the misrepresentation. See *Bengal Weekly Reporter*, Cr. v. 98.

<sup>1</sup> N. Y. P. C. 286.

<sup>2</sup> *Armstrong v. People*, 70 N. Y. 38; *People v. Kenyon*, 5 Park. 254.

that those persons within the regions of consanguinity, with whom marriages are declared by law to be incestuous and void, are not to be punished for adultery or fornication with each other, but that if there is no marriage by impediment for not more than five years. The Earl Russell, speaking of the corruption of girls under duress, says: 'It is most prevalent in the overcrowded portions of large towns, where it is very often complicated with incest. It is to be hoped that some improvement may be effected by better laws for the Education of the Working Classes (43 & 49 Vic. c. 72).'

#### *Seduction under promise of Marriage.*

Lord Russell remarks in his Introductory Report to the Code Crimes and Punishments for Louisiana: 'Seduction is not, I believe, punishable in England, unless preceded by a conspiracy. Yet if we consider the base profligacy of the act, by which the most implicit confidence is destroyed and the most solemn promises and solemnities broken, not only to the utter ruin of the unsuspecting victim, but to the disgrace and misery of her connexions, it is one in which the immorality of the act and the misery it inflicts both require exemplary punishment.' Sec. 342 of the Louisiana Penal Code punishes the seduction of a woman of *good reputation under promise of marriage*. Sec. 284 of the New York Penal Code enacts that 'a person who *under promise of marriage*, seduces and has secret intercourse with an unmarried female of *previous chaste character*, is punishable with imprisonment for not more than five years or with fine not exceeding 1000 dollars or both.' The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offence, is a bar to a prosecution. In Germany, the seduction (no promise of any sort necessary) of a chaste girl under the age of sixteen years is punishable with one year's imprisonment<sup>1</sup>. The Criminal Law Amendment Act has overstepped the bounds of sound legislation in rendering penal the mere act of connexion with a girl under sixteen years of age, though such girl be of known immoral character, and though she have been the actual seducer. But the right-minded men who made a criminal of a chaste girl *under promise of marriage* have made a criminal offence. Seduction could not be punished in India as cheating<sup>2</sup>. (2) of the Code does not cover such a case.

<sup>1</sup> Pam.

<sup>2</sup> Ger.

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The principal provisions of the law are as follows:-  
It is a felony to have unlawful intercourse with girls under sixteen.

It is a misdemeanor to have unlawful intercourse with girls under thirteen and sixteen.

It is a misdemeanor to seduce a girl under sixteen.  
It is a misdemeanor to seduce a girl under twenty-one, who is not of lawful age.

With regard to the first two classes I express my opinion... in the newspapers that the law... a very rude awakening. Indeed, the... will find they will have more than they can handle. The Augean stable of the... morality is due to deep-rooted... of girls between fathers and... that a reign of terrorism... under sixteen will be... had intercourse with them. It may be that girls under sixteen age should and will be... teen may falsely undertake... threat to bring a case. The... suffice. Again, no father will... there are young boys in the house... may not only seduce her mother, but... by levying blackmail. These girls will... to get employment. It is no doubt very... under sixteen should be taken off the streets... now the rescue societies are... of the law. Their... and to enhance the... body. On as to the... would amount... the... 1, 186. g. r. People, 7.

to any serious objection. It is necessary that the girl should be taken 'out of the possession of and against the will of her father or mother, or other person having the lawful care or charge of her.' Infamous or necessitous parents will doubtless abuse the provisions of this section. They will allow their daughters to be kept or taken by procuresses and then they will have ample opportunity for extortion. The danger lies in the fact that in England false charges and perjury are so seldom punished. If there were systematic prosecutions in such cases, as in India, the danger would be very much minimized. Several sorts of abduction were already punishable under English law, viz. (1) abduction of unmarried women of any age for lucre; (2) abduction of girls of property under twenty-one; (3) abduction of women with or without property, in which case it is necessary to prove a forcible taking away or detention against the woman's will; (4) abduction of girls under sixteen without property.

*Procuration of Girls under Twenty-one.*

The clauses as to procuration for brothels merely extend the existing law. Two or more persons are always implicated in such procuration; and it was already a misdemeanour to conspire to persuade a woman to become a common prostitute (*R. v. Howell*). A conspiracy to procure by false pretences connexion with a young female is also indictable. But the first clause of section 2 is quite new, and, I venture to think, indefensible. The clause is so general as to be perhaps unworkable; but, if worked at all, it will cause far more harm than good. The mischief of the old law was that *habitual* instigation or facilitation of debauchery *for gain* was unpunishable. It would have been quite sufficient to have provided against this mischief. *Naturd nihil fit per saltum*; and in this respect legislation should imitate nature, whereas the present clause has made a tremendous bound forward far in advance of the requirements of public morality. This is but one instance of the importance to lawyers and legislators of a knowledge of the criminal laws of other countries on the same subject-matter. Section 334 of the French Penal Code<sup>1</sup> is as follows: 'Whoever *habitually* excites to, instigates, or facilitates debauchery or the corruption of youth of either sex under the age of twenty-one years is punishable with imprisonment from six months to two years. If the offender be the father, mother, guardian, etc., the punishment is from two to five years.' Persons convicted under these sections are deprived of certain family rights, and may be placed under police supervision,

<sup>1</sup> See also s. 379, Belgian Penal Code.

while the parents are deprived of the authority which the law<sup>1</sup> gives them over the person and property of the child. The Court of Cassation in Paris has ruled that these provisions are not applicable to those who wish only to satisfy their own passions, and are not intermediate agents<sup>2</sup>; but they are punishable if they give gifts or make promises to such intermediate agents<sup>3</sup>. In Germany<sup>4</sup> the latter are punishable, if they facilitate debauchery *habitually or for an interested motive*. The Louisiana Code also makes procuring for gain a criminal offence, and Mr. Livingston, the author of that Code, remarks in his Introductory Report: 'Although the private excesses of the passions between the sexes cannot with propriety be made the subject of penal law, yet public opinion in all nations has marked by its decided reprobation him who, without being excited by his own passions, ministers to those of others *for gain*, and in that vile office frequently seduces innocence, or purchases the influence of infamous or necessitous parents to the dishonour of their child. The indication of public sentiment has on this occasion been pursued, and the act has been made penal by the Code.' If such legislation is called for in England, it should be milder and not more severe than the law in countries like France, Italy, and Spain, where unmarried girls enjoy but little liberty, and go-betweens are in consequence more required and more employed. In England, such procuration is unheard of among the upper and middle classes, and as for the lower classes, their daughters enjoy so much liberty, that the intervention of third parties is not called for. Their yielding to or resistance of temptation must depend entirely on themselves. The remark made above as to France, Italy, and Spain applies with tenfold force to India, and indeed to all Eastern countries. If the words 'habitually and for gain' were added, the clause in the new Act might perhaps with some advantage be extended to India; but if put into operation as it stands, it would result in the imprisonment of the whole female population over a certain age. In India procuration is an ingrained habit, the custom of the country, and the illicit intrigues fostered and facilitated by old women constitute a most fruitful source of assaults, woundings, and even murders. If it is found necessary to punish instigation to and facilitation of debauchery in France, Italy, and Spain, much more is such a measure called for in India, where, speaking generally, the want of opportunity engendered by the zenana system is almost the only check on unchastity. One of the Chinese classic authors<sup>5</sup> considers the man as a prodigy of virtue

<sup>1</sup> Code Civil, Bk. i. ix. de la puissance paternelle.

<sup>2</sup> Cass., 24th March, 1853, *et aliunde*.

<sup>4</sup> Germ. P. C. 180.

<sup>3</sup> Cass., 10th Nov., 1860.

<sup>5</sup> See Du Halde, vol. iii. p. 151.



who, finding a woman alone in a distant apartment, can forbear making use of force. A great philosopher has remarked that 'when the physical power of certain climates violates the natural law of the two sexes, and that of intelligent beings; it belongs to the legislature to make civil laws, with a view of opposing the nature of the climate, and re-establishing the primitive laws<sup>1</sup>.' The same author remarks in another place<sup>2</sup>: 'There are climates where the impulses of nature have such force, that morality has almost none. If a man be left with a woman, the temptation and the fall will be the same thing; the attack certain, the resistance none. In these countries, instead of precepts, they have recourse to bolts and bars.' So in India it is scarcely considered possible that a woman, having liberty, could remain chaste. If she has been in such a situation that she had the opportunity of being unchaste, it is presumed that she has been so. In Bengal, old women do much harm by corrupting young wives and widows, and their visits to the houses of well-to-do people are regarded with the utmost suspicion. They constitute indeed a '*belli teterrima causa*,' and assaults arising therefrom frequently find their way into the courts, though it is sometimes difficult to ascertain the motive for the assault, as the old woman complainant does not mention it, and the accused denies the assault. Secluded as women are, they are accessible to go-betweens in the shape of maid-servants, female pân-sellers, the washerwoman, old women who go to husk paddy, and the female barber who cuts the nails of the women of the family and paints their feet with the red henna. It would be well for the security of marital life if some provision similar to that in the French and Belgian Codes were extended to Bengal. It may be safely affirmed that the majority of poor old women in Bengal, who have to earn their own living, eke out a scanty sustenance by facilitating intrigues, or at least are ready to do so. Indeed, so prevalent and ingrained is this habit, that a civilian of unusual experience and knowledge of the people once humorously remarked, that the fact of every old woman in Bengal being a procuress should be regarded as an irrebuttable presumption of law!

In conclusion, it may be remarked that whatever good is effected by the new Act, it will be but infinitesimal compared with the grievous mischief already wrought by the *Pall Mall Gazette* and similar publications. That the open sale of such garbage should be permitted in crowded streets is a disgrace to a civilized country. One cannot touch pitch without being defiled, and it is to be feared that sensual ideas have been implanted in many young minds where they never existed before. That firms existed for the

<sup>1</sup> Montesquieu, *Esp. des Lois*, Bk. xvi. 12.

<sup>2</sup> *Ibid.*, Bk. xvi. 8.

procurement of virgins was a surprise even to 'club-men and aristocrats.' However, if such firms do exist, they could not have had a better advertisement. But it is thought by some who have good means of knowledge that the so-called revelations are founded on the misdeeds of a very few depraved persons. Energy would have been better spent in bringing those persons to justice. As it is, the paths to immorality have become broad and easy roads with large and legible guide-posts to prevent any one possibly going wrong, or rather going right. Young girls are being sedulously taught how they may part with their virtue with the greatest advantage. Where one hitherto may have yielded to temptation on the impulse of the moment, a hundred will now forsake virtue in cold blood from greed of lucre. The Pall Mall Gazette has shown how poor girls may go and earn £5 and then *return to service as if nothing had happened!* Verily, here is the mark of the beast. Juvenal remarked that no one ever becomes corrupt *all at once*—*nemo repente fuit turpissimus olim*. He would probably see cause to modify this assertion, if he lived in these days of indecent literature, when foul prints are scattered broadcast, and filthy descriptions are dinned into the ears of young girls, graphically pointing out the extreme facility of the descent to Avernus, and the profits to be derived therefrom. 'Virginibus puerisque canto' appears to be the motto of these publications. '£5 for a virgin warranted pure!' is a specimen of the placards exhibited in the streets. I can vouch for the truth of the following occurrence. Two modest young girls of about fifteen were waiting for an omnibus outside the Charing Cross Station. Their eyes being attracted by the huge placards and pictures of or in imitation of the Pall Mall Gazette, one of the hawkers cried out: 'Come on, Miss, 'ave a copy. This'll show yer 'ow to earn five pounds!' Such a remark, made to a woman in India<sup>1</sup>, would be punishable with one year's imprisonment and fine. The Pall Mall Gazette alleges that its motives are pure and good; but every sane man is presumed to intend the probable consequences of his acts, and such an allegation savours of the whining plea *ad misericordiam* of the prisoner who has been convicted and sentenced to a flogging.

The criminal immorality, which the new legislation is intended to meet, exists in all its virulence among the lower classes, and much good may be effected, if Vigilance Committees will direct

<sup>1</sup> I. P. C. s. 509: 'Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.'

their efforts towards the removal of this social cancer. Speaking generally, 'club-men and aristocrats' are guiltless of such criminal vices, and it is absurd and unreasonable that they should be condemned owing to the monomania of a few 'Pall Mall Gazette Minotaurs.' It is enough to make an ordinary mortal shudder to read the account given by the 'Chief Director of the Secret Commission' of his criminal intrigues and cold-blooded machinations. If such account be not exaggerated, then 'Our Secret Commissioner' must himself be a veritable Minotaur, and a sentence of penal servitude for life would not be too severe for him.

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## REVIEWS AND NOTICES.

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[Short notices do not necessarily exclude fuller review hereafter.]

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*The Patriarchal Theory.* Based on the Papers of the late JOHN FERGUSON McLENNAN. Edited and completed by DONALD McLENNAN, M.A., of the Inner Temple, Barrister-at-Law. London: Macmillan & Co., 1885. 8vo. 354 pp.

THIS book is in substance, though not in form, one of those unsatisfying productions—a book left unfinished in consequence of the death of its author. Owing to the failing health of the late Mr. McLennan, this work was commenced by him in co-operation with his brother. After his death the treatise was completed with the aid of notes embodying his views upon the subject. A portion alone is put forward upon the responsibility of the editor, though it probably follows out the direction of Mr. McLennan's ideas. In appearance therefore there is nothing fragmentary in the work as finally presented to the public. In truth, however, it is only the portal of a larger building, designed by an architect who has carried his plans with him to the grave. This treatise, so far as it embodies the ideas of the late Mr. McLennan, is purely destructive. It was intended to overthrow the views of a particular author. When these had been cleared away, Mr. McLennan had intended to fill up the blank by a great constructive treatise, enforcing his well-known theories as to the origin of society by a more extensive body of evidence, and by new explanations and suggestions. This work was never commenced. Not even a hint appears to have been left behind as to its character or scope. So far as Mr. McLennan's teaching took a constructive form, it has not been advanced by the present volume. Our object is, not to examine or discuss his general views, but to consider how far the work before us has strengthened or altered the argument in their favour.

Sir H. S. Maine, in his well-known work on *Ancient Law*, had put forward that view of the primeval condition of the human race which is known as the Patriarchal Theory. 'Society in primitive times was not what it is assumed to be at present, a collection of individuals. In fact, and in the view of the men who composed it, it was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the Family, of a modern society the Individual.' 'The elementary group is the Family, connected by common subjection to the highest male ascendant. The aggregate of Families forms the *Gens* or House. The aggregation of Houses makes the Tribe. The aggregation of Tribes constitutes the Commonwealth.' The supremacy of the ruling male ancestor over the junior members of the family Sir H. S. Maine designated by the term of Roman law, *Patria Potestas*. The preference for direct male heirs over kindred claiming through a female, which had its extreme form in the Roman system of Agnation, he deduced as a necessary result of the *Patria Potestas*. In some states of society both were found existing together. In others, from finding a preference for Agnatic heirship, he inferred that a *Patria Potestas*, of which no other trace remained, must have formerly prevailed.

Mr. McLennan's antagonistic theory was stated by himself in a former work (*Studies in Ancient History*, p. 235) in the following propositions:— '(1) that the most ancient system of heirship in which the idea of blood relationship was embodied was the system of kinship through females only; (2) that in the advance from savagery this system was succeeded by a system which acknowledged kinship through males also, and which (3) in most cases passed into a system (agnation) which acknowledged kinship through males only; finally (4), that agnation broke down, and there was again kinship through females as well as through males.'

Now, upon a mere inspection of these rival theories, it is obvious that they have much in common. Mr. Donald McLennan does not deny that the Patriarchal Family in its strictest form did exist in antiquity, though, upon the authority of Gaius, he limits it to the Romans and the Asiatic Galatae. It is part of Mr. J. F. McLennan's theory that social life inevitably reached a stage in which kinship through males, and even through males only, became the accepted rule. On the other hand, Sir H. S. Maine nowhere claims for his theory that it is one of universal application. He admits to the fullest extent the existence amongst many races of promiscuity and polyandry, and of that habit of tracing kinship through females which results from such practices. In his latest work (*Early Law and Custom*, p. 204) he says, 'There are unquestionably many assemblages of savage men so devoid of some of the characteristic features of Patriarchalism, that it seems a gratuitous hypothesis to assume that they had passed through it.' In his *Early History of Institutions* (p. 65) he expressly limits the prevalence of the Patriarchal system to the Aryan and Semitic races, and to 'that portion of the outlying mass of mankind which has lately been called Uralian—the Turks, Hungarians, and Finns.' Even among these races he admits that 'if they suffered from a scarcity of women, such phenomena as polyandry and a tracing of kinship through women would probably shew themselves, and at any stage of social growth' (*Early Law and Custom*, p. 220). The variance between the two writers is, that Mr. McLennan asserts that every race whose family system is founded on kinship through males, has passed through an antecedent stage in which kinship was traced through females, and that this earlier family system was itself the necessary result of a relationship between the sexes, which commenced in promiscuity, and passed through successive phases of polyandry, until monogamy or polygamy was ultimately reached. Sir H. S. Maine denies, as regards the higher and, as he terms them, the more respectable races, that any such antecedent stage can be shown to have had an invariable existence; still more that it can be shown to have had a necessary existence. This, as he himself points out, is the whole question at issue.

The first step by which the authors of 'the Patriarchal Theory' proceed to the demolition of the author of *Ancient Law*, is to establish that neither *Patria Potestas* nor Agnation can be found among any of the nations, other than the Romans, among whom Sir H. S. Maine professed to have traced its existence; that is to say, not amongst the Hebrews, the Hindus, the Slavs or the Irish. This, of course, would be a very weighty *argumentum ad hominem*, if it were made out. On examination, however, the proof only purports to remove, or render improbable, the existence of a *Patria Potestas* or Agnation which Sir H. S. Maine had never asserted. Mr. McLennan quotes the following passage from *Ancient Law* (p. 123) as defining that *Patria Potestas*, whose existence he then proceeds to deny. 'The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children

and their houses as over his slaves; indeed, the relations of sonship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of a family himself.' This of course is technically true of the early Roman father. In the passage where it occurs it is only asserted to be true of the Hebrew Patriarchs, so far as their usages may be collected from the early chapters in Genesis. It is even pointed out that at the time of Jacob and Esau there are traces of the first breach effected in the empire of the parent, and of an order of rights superior to the claims of family relation. It may possibly be that, even as regards the early Hebrew Patriarchs, the paternal power was over-stated. It is nowhere asserted that a power of this extent continued among the Hebrews, or existed elsewhere. In the *Early History of Institutions* (p. 310) it is said of the Patriarchal Family, 'The group consists of animate and inanimate property, of wife, children, slaves, land and goods, all held together by the despotic authority of the eldest male of the eldest ascending line, the father, grandfather, or even more remote ancestor.' In *Early Law and Custom* (p. 193), the Patriarchal theory is stated as 'the theory of the origin of society in separate families, held together by the authority and protection of the eldest valid ascendant.' It is expressly admitted (*Ancient Law*, p. 150) that 'the powers themselves are discernible in comparatively few monuments of ancient law, but agnatic relationship, which implies their former existence, is discoverable almost everywhere.' The question, and the only question of importance, is, whether the family system of the higher races at the earliest dawn of history does not disclose a father, capable of being identified, recognised and revered by his descendants and dependants, and whether the existence of such a father is not inconsistent with a rival theory of society, which negatives the possibility of such a father.

Again, as regards Agnation, the authors of 'The Patriarchal Theory' seem to assume that Sir H. S. Maine had asserted that it existed, among all the races to whom he refers, in its strictest acceptation, to the exclusion of all females, or persons claiming through females. Naturally they triumph over and trample upon him by the demonstration that the contrary was the fact. But this is a purely gratuitous assumption. In his *Ancient Law*, Sir H. S. Maine pointed out (p. 149) that the natural result of a family being held together by paternal authority would be, that the limits of the family would not extend beyond the limits of the authority. Consequently that the offspring of females would, while the system continued unrelaxed, not be heirs. He expressly stated (p. 152) 'that Primitive jurisprudence, though it does not allow a woman to communicate any rights of agnation to her descendants, includes herself nevertheless in the agnatic bond.' In *Early Law and Custom* (p. 193) he said, 'we have not indeed knowledge of any working system of institutions in which the family exactly corresponds to the primitive family assumed by the theory.' In p. 115 of the same work he noticed, and founded an important argument upon, one of the phrases of Hindu law, in which it admitted cognates in preference to agnates of a very near degree. It is of course familiar knowledge that the strict rule of agnation was relaxed in Roman law by the action of the praetor. What is material, and what is alone material, to Sir H. S. Maine's argument is to show that the rules of inheritance in any particular race favoured the direct descent through males, and assumed that at each stage the evidence of paternity was clear and undisputed. When we find the Jewish writers setting out a series of genealogies which trace an unbroken line of male descents from Adam to Christ; when we find the Hindu Princes of Oode-

pore professing to possess a similar unbroken pedigree from the Sun to the present time; the tables of descent may be genuine or fictitious, but one thing is quite certain, that those who put them forward never imagined there had been a time when descent was traceable, if at all, only through females, because fathers had not been found out.

It seems to us that the whole of this branch of Mr. McLennan's argument is based upon what the old logicians used to call an *ignoratio elenchí*. Assume to the fullest degree that any system of inheritance admits the heirship of females and of persons claiming through females. If this system was, so to speak, an original system, and not merely a transition or a development, it might militate very strongly against Sir H. S. Maine's view that agnation is at first the necessary result of a patriarchal family. But if in each case the heirship is traced to a known male, what assistance does it give to Mr. McLennan's theory? Grant that a daughter may succeed to her father, or a daughter's son to his maternal grandfather; how does this prove, or tend to prove, that there ever was a time when a daughter succeeded to her mother, or a daughter's son to his grandmother, because the father or grandfather was unascertained and unascertainable? If it does not prove this, it proves nothing which can be of any service to Mr. McLennan.

Throughout all Sir H. S. Maine's works written since his own personal acquaintance with India, he has relied very strongly in support of his theories upon the evidence furnished by Hindu law. Naturally so. In the first place the evidence is itself open to no dispute. Hindu law is a living system which is being administered every day by our own countrymen to the natives of India. Its principles are set forth in a number of authentic writings, extending from a period of immense antiquity almost down to the present century. But to the student of comparative jurisprudence, Hindu law is of inestimable importance for another reason. The Hindus are only one of the many offshoots of the great Aryan stock, which cast off as its collateral branches, Greeks and Romans, Teutons, Slavs and Celts. When we find in any two or more of these races similar principles, such as ancestor-worship, paternal supremacy, adoption, preference of male heirs and the like, we may safely assume that a similar principle existed in the original race from which all have equally descended. And so from the almost unbroken record of Hindu law, we may fill up blanks in the legal history of the kindred races, with the same certainty as that which enables the palæontologist to pronounce upon the missing bones of an imperfect fossil from the completer skeletons unearthed in coeval strata.

Of course the Messrs. McLennan were perfectly aware of the importance of Hindu law to their argument. If its evidence told wholly in favour of their opponent, it would be necessary to interpret in a similar manner the more obscure or fragmentary data derivable from the related systems. If it could be wholly wrested to their side, it is hardly too much to say that every opposing theory based on Aryan usage would crumble away. It will be necessary, therefore, to examine in some detail the process by which the authors of the Patriarchal Theory attempt to make out that Hindu law does not establish the existence of paternal supremacy and descent through males, and that its rules are only explicable on the assumption of a pre-existing period of promiscuity, polyandry, and kinship through females.

First then as to Paternal Supremacy. Our authors maintain (ch. v.) that there was no *Patria Potestas* among the Hindus, because the head of the family could not kill or sell his wife or children; because the junior males, and even the females, of the family could hold property over which he had no control;

and because, even over the family property, the junior males had rights, amounting in some cases to a right of exacting a share during the father's life. This is all quite true, and proves that the Paternal Supremacy of a Hindu father fell very far short of that of a Roman father. It does not show that it did not exist. No one would deny that an English father is despotic over his children while of tender years, or that till lately he was despotic over his wife; yet no one supposes that he can kill or sell them, or that they are incapable of holding separate property. Let us see what the position of a Hindu father really is.

There are two principles of Hindu law which are apparently, though not really, in conflict. One is the corporate character of the family property; the other is the paternal authority. The normal condition of a Hindu family is that all its male members are joint owners of the whole family property. If they continue, as they often do, for many generations without exercising their right of partition, the joint family consists of as many males in the direct line of descent as the duration of human life allows, and of a perfectly unlimited number of collaterals. The manager of the property for the time being is generally the eldest male, or the eldest of the eldest branch. As regards the collateral relations the manager is merely an agent, with no higher powers than the law would vest in the director of a company. He cannot sell or mortgage the family property, or incur debts upon its credit, except for purposes beneficial to it. According to the strict law, which is still enforced over the greater part of India, he cannot even sell or mortgage his own share for his own individual purposes.

When, however, we examine the position of the same manager as regards his own immediate family, consisting of his wife, daughters, and male issue to the third generation, his powers are very different. We have evidence that in very early times they were far more extensive than they are now. Manu says, 'Three persons, a wife, a son, and a slave, are declared by law to have (*in general*) no wealth exclusively their own; the wealth which they may earn is (*regularly*) acquired for the man to whom they belong.' (Manu, viii. § 416. The words in brackets are a gloss of Kulluka, and do not occur in the original.) Narada says of a son, 'He is of age and independent, in case his parents be dead; during their lifetime he is dependent, even though he be grown old.' (Narada, iii. § 38.) To the present day it is stated by Dr. Hunter that among the Kunds of Orissa 'in each family the absolute authority rests with the house-father. Thus the sons have no property during their father's life.' (Hunter's Orissa, ii. 72.) A similar usage still exists among the Tamil inhabitants of Jaffna, where all acquisitions made by the sons while unmarried, except mere presents given to them, fall into the common stock. (Thesawalema, iv. 5.)

These extreme rights of the father were trenched upon by the growth of conflicting rights, viz. those of separate property and partition. A married woman was allowed to have exclusive control over presents given to her for her separate use, by her own near relations and by her husband, especially at the time of her marriage. (Manu, ix. § 194.) But it was still laid down that 'the wealth which is earned by mechanical arts, or which is received through affection from any other but the kindred, is always subject to the husband's control.' (Daya Bhaga, iv. 1, §§ 19, 20.) In the Punjab it is recorded by Messrs. Boulnois and Rattigan, the former of whom was lately Chief Judge of the Chief Court, that 'in village communities such a thing as woman's separate property seldom exists.' (Punjab Customary Law, 64.)

The right of a junior male member of the family to make separate acquisitions sprang up very slowly. Originally it was limited to the gains



of science and valour, but even these were little favoured. The slightest use of the family property barred the self-acquisition. Nor is it certain that originally the whole of the separate gains went to their acquirer. (See Mayne, Hindu Law, 3rd ed., p. 208 *et seq.*) Gradually, however, with the extension of commercial and professional earnings the doctrine became of more importance.

The growth of the law of partition was even more gradual. In very early times land with its flocks and herds would be the only form of wealth. A text of Uçanas (Mitakshara, i. 4, § 26), which asserts that land is indivisible among kinsmen even to the thousandth degree, seems to take us back to a time when the nucleus of the family property was impartible. No doubt the right of partition would advance *pari passu* with the right of self-acquisition. It was admittedly favoured by the Brahman jurists on the ground that religious duties were multiplied in separate houses. Yet the earliest Hindu lawyers in the most express terms denied the right of a son to have a partition till after his father's death. This is to the present day the law of Bengal. The author of the Mitakshara, who extended to the utmost the joint rights of the son in the family property, laid it down that a son could enforce a partition of the family property even during his father's life and against his consent. Yet so thoroughly was such a right opposed to popular feeling that it was seldom enforced and constantly denied. Up to a period of about twenty years ago the right was treated as an open and an arguable question by all the High Courts which administered the Mitakshara law, and no later than in April of this year the point was solemnly and finally disposed of by the High Court of Bombay. (See Mayne, Hindu Law, 3rd ed., pp. 210-215, 442; Law Quarterly Review, p. 390.)

As respects the whole of this part of their argument, Messrs. McLennan have fallen into the mistake of treating Hindu law as if it had no history, and as if the paternal authority of the primeval parent was restricted by all the limitations which have grown around it during the lapse of some two thousand years. They have fallen into the further error of ignoring some of the most remarkable instances of that authority which survive to the present day.

One of these instances arose out of the religious obligation of a son or grandson to pay the debts of his male ancestor, even though they were purely personal to the debtor, and in no way beneficial to himself, provided they were not immoral in their origin. The obligation attached even though the descendant had received no assets from the ancestor, and, where the debtor was his father, he was bound to pay not only principal but interest. From this obligation has been deduced the further consequence, that a father or grandfather could sell or mortgage the whole joint property of himself and his descendants, in order to pay off his own personal debts, because this is merely doing by anticipation in his lifetime what the law would compel his offspring to do after his death. (See Mayne, Hindu Law, 3rd ed., pp. 272-275, 278-283.) The result is, that the very same man who, in his capacity of manager of the family property, has no power to bind any of the joint owners against their will for purposes not beneficial to themselves, and cannot even dispose of his own share for his own benefit, may, in his capacity of male ascendant, dispose not only of his own share, but of the shares of his descendants, for debts which did not even profess to be contracted with their assent or for their benefit. Surely this is a crucial instance of Paternal Supremacy.

Another remarkable instance of the same power is the right of the father to give away—in ancient times even to sell—his son in adoption. A

millionaire may in this way hand over his infant son to a pauper, and cut him off for ever from all right in his own natural family. The act is irrevocable and without appeal, and however flagrantly injurious it may be to the infant's prospects, there is absolutely no process by which it can be prevented. This power is solely vested in the father, and, after his death, actual or civil, in the mother as the surviving representative of the father's authority. (See Mayne, *Hindu Law*, 3rd ed., p. 120.) Short of the power of life or death, it is difficult to imagine what stronger proof of parental authority could be furnished than this.

Let us now see what support the Hindu law of inheritance can furnish to Mr. McLennan's theory of kinship through females.

In the first place, then, it must be remembered that the whole ceremonial religion of the Hindus, as of the Greeks and Romans, rested upon the worship of their male ancestors. These extended to fourteen generations. (Rajkumar Sarvadhikari, *Law of Inheritance*, i. 54-57.) It was assumed therefore that a man could identify not only his father, but his male ancestors in unbroken line extending over about 400 years. No mention whatever is made of female ancestors in the texts of Manu which prescribe these ceremonies. As to the law of succession, the rule of early Hindu Law, which still prevails everywhere except in Bengal and Bombay, is that no cognates, or males deriving through a female, are admitted to the inheritance until every male claiming by unbroken male descent up to fourteen generations from a common male ancestor has been exhausted. Baudhayana and Vasishtha, writers far earlier than Manu, mention no females in their list of heirs, and the former expressly states, on the authority of a text of the Vedas, that women have no right to inherit. (Baudhayana, ii. 2, 3. § 46.) His authority is still so far respected that the schools of Bengal and Benares consider that women can only inherit under some express text. (See per Curiam, L. R., 7 I. A. 231.) The exceptions allowed by these texts to the exclusive right of males claiming through a male are the widow, daughter, daughter's son, and the mother and other female ascendants. A sister is nowhere mentioned.

Now, of these excepted cases, the widow and female ascendants are strictly agnates; upon marriage they lose the *gotra* or family of their origin, and pass into the family of their husband. The daughter comes under the same rule till her marriage; but she, in common with the other female heirs, only takes an estate for life; and after her death the inheritance returns to the heirs of her father. The daughter's son, however, is from the first a member of a different family, and takes absolutely, and as a new stock of descent. The question arises, how this undoubted exception to the general rule was admitted? The explanation seems to be found in a very obscure branch of the Hindu law, which enabled a sonless father to appropriate to himself the first son of his daughter, who was then called an appointed daughter. Manu says, 'By that male child whom a daughter thus appointed, either by an implied intention or a plain declaration, shall produce from an husband of an equal class, the maternal grandfather becomes in law the father of a son: let that son give the funeral cake and possess the inheritance.' (Manu ix. § 136.) Originally, then, the daughter's son inherited, because by the act of the grandfather he was taken out of his own family, and affiliated to the family of his maternal grandfather. Afterwards the practice of appointing a daughter became obsolete, but the rights of a daughter's son were preserved, partly on account of his near consanguinity, and partly because in his own capacity he was entitled to make offerings to his maternal grandfather. What confirms this view is,

that in the order of succession he does not take as a cognate, which he actually was, but among the Gentiles, to whom strictly he could not belong. A still more important confirmation is derived from an application of the maxim, '*Cessante causa cessat et ipse effectus.*' In the Punjab the reasonings and theories of the Brahmanical lawyers never took any root. Now there we find the universal rule to be that neither a daughter nor a daughter's son ever inherit. Sometimes a daughter takes till her marriage, that is, while she is in the family. Her son never takes, because he is out of it. 'The general idea is that the daughter has a right to be suitably married—nothing more. Among Hindu tribes, and among some Mussulman tribes, the daughter must marry into another *got*, to which thereafter she and her children belong; and as one of the strongest feelings is that property must not leave the *got*, she and her children have no right to inherit her father's property.' (C. L. Tupper, *Punjab Customary Law*, ii. 145. See also p. 79. Boulnois and Rattigan, pp. 16–37.)

So far it would seem that there is nothing in the Hindu law of inheritance which favours the theory of kinship through females, as necessarily arising from the absence of a recognised male ancestor. But Mr. Donald McLennan has two elaborate chapters (xvi and xvii) on Sonship among the Hindus, from which he arrives at the conclusion that kinship among the Hindus was, after all, founded on maternity.

According to the very early Hindu law, a man might have numerous different sorts of sons, who came under the following heads:—(1) Those of whom he was the actual father, by a lawful wife or a permanent mistress; (2) Those whom he adopted; (3) The son of his appointed daughter; (4) The son of his unmarried daughter, born while she was still a member of his family; (5) The son with which a man's bride is pregnant at the time of her marriage; (6) The sons begotten upon a man's own wife or widow, by a person who was specially authorised to raise up issue to him; (7) The sons begotten upon another man's wife by a person to whom the husband had sold the right of intercourse with her. As regards all these the present writer said, in a work published in 1878 (*Mayne, Hindu Law*, 3rd ed., p. 59): 'A man's son need not have been begotten by his father, nor need he have been produced by his father's wife. How is such a state of the family, which seems to set genealogy at defiance, reconcilable with a system of property which is based upon the strictest ascertainment of pedigree? I believe the answer is simply this—that a son was always assigned in law to the male who was the legal owner of the mother. Further, that the filial relation was itself capable of being assigned over by the person to whom the son was subject, or by the son himself, if emancipated.' The latter proposition, which relates to adoption, is immaterial to the present enquiry. The former is substantially adopted by Mr. McLennan. He says (p. 313): 'Sonship was not founded upon paternity. It was founded upon maternity, and through the mother a child belonged to the man who possessed rights over the mother.' Again, at p. 315: 'Marriage was commonly among early Hindus an affair of sale and purchase, and the peculiarities of Hindu family law sprung out of an early system of contracts for marriage made on that footing.' 'It is easy to see that the facts are exactly what we might expect to find were such a system of contract superinduced upon the system of counting kinship through females only. This system of kinship makes children of their mother's stock, and affiliates them to their mother's family—whatever be the connection of which they are the offspring. What would happen then if there were superinduced upon it a system of contract in virtue of which a woman with her issue was transferred from her family

to a husband, and she was taken into the husband's stock? The children, being of the stock of their mother, would now be of the stock of her husband, so that they could be his children; and, being his in virtue of the contract, they would be his children. And as his daughter would be his, so would her issue, except so far as he had transferred it by contract to another man. Her child born before marriage would be his. If when she was married, he bargained to have a child of the marriage, that would come back to him; when he gave her over to a husband without reservation, her children would be the husband's, and all her children would be his—if he chose to have them—whether they were his own offspring or not. Contract following upon kinship through females only would therefore yield in the first instance precisely the system of parental right and sonship which we have found among the Hindus.'

Now the first objection to this argument is that it begs the whole question. Assuming a system of kinship through females, that might have been transformed into a system of kinship through males by contractual marriages. But where is the proof that the Hindus as a race—still less that the original Aryan stock—ever had a family system based upon female kinship? The evidence is all the other way. What is the use of supplying a tortoise to support the world, when the tortoise itself has nothing to stand on? Again, how will the theory fit in with cases where there never has been a marriage, such as the offspring of a concubine or a slave? How were they transferred from their mother's family? How does it fit in with the marriages where there was no contract? At the time when these various sorts of sons existed, there were eight forms of marriage, only one of which involved sale and purchase, and it is condemned by Manu (iii. 41) as one of the base marriages which produce false, cruel, and irreligious sons. Three of the forms are inconsistent with any consent of the parents. Marriage by capture, which was Mr. J. F. McLennan's special discovery, is founded on force and not upon contract. The theory seems to have the fatal defect of not meeting all the cases which it is intended to explain.

Apart from admitted cases of polyandry among the hill tribes of India, and cases of mere moral laxity, Mr. McLennan's only positive argument as to the former existence of his assumed family system appears to be derived from the early law which permitted the marriage of a widow with her brother-in-law, and the Levirate. The argument appears to be that both are so repulsive, that they can only be accounted for by assuming that habits of polyandry, in which one woman was the wife of several brothers, had made such connections familiar and natural to those who practised them. One is tempted to enquire, if these practices can only be accounted for by the grosser form of polyandry, how can polyandry be accounted for? If society could adopt the more repulsive mode of life, it could equally have originated the less repulsive form, as children say, out of its own head. But it seems to us that the argument will not bear examination. First, as to marriage with a deceased husband's brother. Is there anything naturally repulsive in this? It is simply the converse of marriage with a deceased wife's sister, for the encouragement of which an influential society exists among ourselves. Does Mr. McLennan think it necessary to account for such marriages by supposing that Englishmen were once polygamous, and formed a taste for their sisters-in-law by marrying a whole family at once? In the case of the Hindus the reasons for marrying their brothers' widows were so strong that it is strange the habit did not become universal, instead of becoming obsolete. Brothers and their wives all lived together in the same house. On the death of one brother the survivor would have to

maintain and manage his brother's widow as well as his property. An old text says, 'In all the four classes wives and goods go together. He who takes a man's wives takes his property also. The wife is considered the dead man's property.' (Narada, iii. §§ 23, 24.) Apparently the wife passed by descent as a chattel.

The Levirate is a matter of a little more difficulty. The admitted facts are as follows. (Mayne, *Hindu Law*, 3rd ed. pp. 61-65.) In early times it was the practice for a Hindu, who failed to beget sons, to authorise another man to beget a son upon his wife. He might employ any one he liked for this purpose, and in several of the best known cases the person employed was not of the same family, nor even of the same caste, as the husband. Another practice, which Mr. McLennan calls the Levirate, was that in the case of a man who had died sonless, his widow was allowed to have a son procreated upon her. This permission, however, was accompanied by restrictions which did not exist in the former case. Some family authorisation was necessary, and the procreator must be a brother of the deceased, or a very near relation. Now as to this, the present writer suggested that the latter practice was merely an extension of the former. But there was this difference between the two cases, that in the latter, for the first time, the element of fiction was introduced. In the former case, the husband became the father, not by any fiction of paternity, but by the simple fact that he was the owner of the mother. But after his death the ownership had ceased, unless, indeed, by another fiction, he was considered as still surviving in her. (The husband is even one person with his wife. *Manu*, ix. 45. Of him whose wife is not deceased half the body survives. *Vrihaspati*, 3 Dig. 458.) Therefore, unless the husband had given express directions during his lifetime, the process to be adopted was to be as like as possible to an actual begetting by him, or was to be such a substituted begetting as he would probably have sanctioned.

To this Mr. McLennan objects in the first place (p. 270) that the fact which created paternity in the former instance (*viz.* continued ownership of the wife) was wanting in the second. But that is the case with all legal fictions. The essence of them is an assumption that something exists which does not exist. An exact analogy is furnished by the Hindu law of adoption. A man who adopts pretends that he has begotten a son: here he might have done what he pretends to have done. He dies leaving his widow an authority to adopt, upon which she acts: here he could not have done what he pretends to have done. The fiction is more fictitious. But suppose he has left no authority to adopt, the law of part of India allows an authority to be supplied by the relations or by the widow herself. Here the fiction is trebled. They pretend that he has pretended to do something which he could not have done. Then Mr. McLennan (p. 271) falls into the mistake of supposing that in the Niyoga (during the husband's life) there was the same necessity as in the Levirate that the physical father should be the brother or near relation of the putative father, and asks what originated the Niyoga itself, and why did the same limitation exist in both instances? The answers he supplies are that both are survivals of Tibetan polyandry. The real answer is that there was no such limitation in the Niyoga, and that the origin of it was simply that a sonless man was supposed to go to Hell, and that there was nothing in early Hindu law or morals to prevent a husband saving himself from Hell by submitting his wife to the more fruitful embraces of another man. If he died without so saving himself, his relations tried to save him by carrying out the same process posthumously in the most delicate way they could invent.

Lastly, Mr. McLennan suggests (p. 272) that the explanation does not account for the Levirate in the Hebrew or other systems. Perhaps not; but wherever the Levirate does exist two conditions will probably be found. One, some very strong motive inducing a father to leave a son behind him; the second, something in law or social usage which renders it unnecessary that that son should spring from his own loins. Couple these conditions with a considerable lack of female delicacy, and the Levirate will not be more insoluble than any other legal problem.

We do not of course profess to have dealt with every part of Mr. McLennan's argument. The space at our disposal forbids us to do so. We have refrained from entering upon legal regions where every step is at present based upon conjecture. The strength of the case against the authors of 'The Patriarchal Theory' rests upon Hindu law. The bulk of their treatise is devoted to meeting that case. In our opinion they have not met it, and the views put forward by Sir H. S. Maine remain unshaken by the work under review. If anything, they occupy a stronger position, from having repelled assailants of such ingenuity and vigour as the brothers McLennan.

JOHN D. MAYNE.

*A Treatise on the Law of Collisions at Sea.* By REGINALD G. MARSDEN. Second Edition. London: Stevens & Sons. 1885. 8vo. xlviii and 560 pp.

MR. MARSDEN's second edition is just what the second edition of a legal text-book should be. It represents the more mature thoughts of the writer, more carefully expressed, more thoroughly elaborated, more furnished with instance and example than the first and perhaps somewhat crude work.

Mr. Marsden is a lawyer, but he is also a seaman; and herein lies great part of the value of his book. He looks at the decisions which form now an elaborate commentary on the Rule of the Road at Sea quite as much from the point of view of the man who has to steer his ship by them and keep her from collision as from that of the lawyer who in his study has to apply these rules as tests of theoretical responsibility for collisions already incurred.

It would perhaps have been better had Mr. Marsden confined himself a little more closely to the lawyer-sailor point of view. There are symptoms of a tendency to convert his work into a treatise on Admiralty procedure, which would spoil it as a manual for seamen: and it is not so clear that Mr. Marsden possesses the necessary gifts for such a treatise. As it is, the passages in pages 36 to 40 seem out of place and jejune, and do not show a complete grasp of the subject; while at p. 81 decisions as to the procedure for enforcing a master's claim for wages against a company in liquidation are cited as decisions upon the priority of liens for damage by collision.

The main part of his work however is the handling of the Rule of the Road; and here Mr. Marsden is of use not only to English sailors and lawyers, but to those of all nations. It is curious how all Codes become encrusted with commentaries, and how the unavailing struggle to escape the commentator leads only to an amended code of inordinate length. Mr. Marsden points out in his preface (p. vi) how serious an evil the complexity of the present rule has become; and when one thinks that in 1840, even after the introduction of steam-ships, one rule in five clauses sufficed for all purposes, and contrasts this with the twenty Articles of 1862, and this again with the twenty-six Articles full of sub-clauses and provisoes of 1884, one sees how well-founded is the writer's caution.

On another point, the origin and application of the rule as to the division of damages, Mr. Marsden's treatise is of interest for the jurist. Still more interesting will be the collection of ancient Admiralty 'sentences' which he proposes to publish separately.

After the researches of Dr. Raikes and Mr. Marsden it certainly seems that the Admiralty rules as to division of damages are not so ancient or so general as they have been supposed to be. But the last word will not have been said on this subject until the origin of the difference between the English and the American rule has been traced. The American rule has a wider application than the English, as it divides the damage where the fault is inscrutable, that is, where it is clear that there has been negligence, but it is not possible to ascertain which was the negligent party. Mr. Marsden has lost hold of this point, by reason of an unfortunate misunderstanding of the American case of 'The Clara' in 12 Otto's Reports. He cites it (p. 132, note k), as a decision that where the fault is inscrutable neither can recover. But in fact the Court decided that there was fault, and that it lay with the plaintiffs' ship alone, and therefore the plaintiff could not recover.

The book before us is so good that the few corrections which we now propose to make are inserted here only with the view of rendering it as complete a work of its kind as possible.

At p. 79 the definition of a 'ship' requires recasting since the decision of the English Court of Appeal in 'The Mac'—a case which is referred to somewhat out of its place at p. 175.

At p. 101 the case of 'The Limerick' is given as an authority; but the case so far as it was an authority on this point was reversed on appeal. L. R., 1 P. D. 411. At p. 109 the case of 'The Maid of Kent' is inaccurately stated.

The law as to tug and tow has perhaps not yet reached its final settlement, and it certainly does not commend itself to Mr. Marsden; but it is not so irrational as he represents it to be at pp. 190, 191. The tow has been held responsible for the fault of the tug because the latter has been treated as the tow's servant; but the tug has not been held responsible for the tow.

The comments at p. 218 on the application to foreign ships of the English statute making desertion *prima facie* evidence of previous negligence would not have been made if the writer had more clearly grasped that the legislature is giving directions to its own Courts how they are to proceed, and that *lex fori* is as binding upon foreigners as upon natives.

Pilotage law is the most unintelligible and disagreeable subject with which a practitioner in the English Admiralty Court has to deal. There is, as Dr. Lushington once said, no reason to be discovered why some ships should be compelled to take pilots in English waters and others not. But Mr. Marsden has upon the whole mastered the ins and outs of the various cases. He has however misunderstood the case of 'The Hankow,' and has consequently fallen foul of it three times (pp. 234, 258, 269). If he had noticed that 'The Hankow' was carrying passengers and was therefore bound under the Merchant Shipping Act, 1854, to take a pilot, unless she could show exemption under earlier statutes, he would not have been troubled by the decision.

At p. 276 it is said that the shipowner has the liabilities of a common carrier; and the case of *Nugent v. Smith* (L. R., 1 C. P. D. 423), which does not so decide, but rather implies the contrary, is cited.

At p. 280 it is not perceived that the defendants in *Doolan v. Midland Railway Co.* (L. R., 2 App. Ca. 792) came under the Railway and Canal

Traffic Act, and could not make the contract which they sought to set up.

At p. 374 the rule as to steam-ships meeting 'end on' is not explained with the writer's usual clearness; and cases decided before the rule took its present shape of exact definition are quoted as if they were authorities upon its present construction, whereas in truth the words of definition were added to show that the rule did not apply to these cases.

It is believed that the above is a pretty exhaustive list of imperfections; subject to these few defects, the treatise is one (as it appears to the present writer) of the greatest value.

W. G. F. P.

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*A Treatise on Communication by Telegraph.* By MORRIS GRAY, of the Boston Bar. Boston, Mass.: Little, Brown & Co. 1885. 8vo. xvi and 278 pp.

THIS is one of the works on special subjects of commercial law which, so to speak, cut across a number of interesting questions of principle. Mr. Gray has gone to work in a clear-headed and business-like fashion, and it will be no fault of his if the lawyer engaged in a telegraph case (meaning thereby not only a case in which a telegraph company is directly concerned, but any case in which the legal conditions or effect of communication by telegraph are in question) fails to ascertain from his book what line of argument is reasonably likely to serve his purpose, by what authorities it can be supported, and what are the difficulties he may expect to contend with.

In America the Post Office has not undertaken telegraphic business; it is in the hands of private corporations, which however are deemed to exercise a public calling the profession of which binds them to serve all customers properly demanding their service. In England questions of the same kind may still arise, and have arisen, with regard to companies doing foreign telegraph business, for whom the Post Office receives messages only as an agent. As to the American authorities, attempts have been made to hold the companies liable as common carriers; but the better opinion is that their position is like that of railway companies as carriers of passengers; in other words, they are not liable for pure misadventure but only for negligence, or more exactly, their contract is to use all reasonable diligence. Mr. Gray cites from Alabama an odd case of delivery to an impostor. *Z* telegraphed to *A*'s uncle in *A*'s name, asking for a telegraphic money order. The confiding uncle telegraphed an order addressed to *A* at the place (not *A*'s habitual dwelling-place) whence *Z* had telegraphed. *Z* got the message and the money. The uncle on discovering the imposture sued the telegraph company. The Court 'regarded the delivery to the impostor as a misdelivery, but an excusable one.' Mr. Gray thinks the company had performed its contract by delivering the message to the person to whom the sender intended it to be delivered, him, namely, who had telegraphed in the name of *A*. This appears to us to be the right view. Suppose *A*'s uncle had seen through the trick, and had sent the order asked for on purpose to lay a trap for *Z*, and that the company's people, having also discovered the truth, but not knowing that the sender knew it, had taken on themselves not to deliver the message, or had delayed forwarding or delivery in order to communicate with the sender; this, however well meant, might surely have been treated by the sender as a breach of contract.

Points of a kind familiar in this country in relation to the contracts of



railway companies and shipowners are raised by the special conditions commonly printed on the blank message forms of the American companies. Mr. Gray sets out the common forms of one of the great corporations, and considers them in some detail. It seems that telegraph companies there, like railway companies here, sometimes overreach themselves by making the special conditions so large as to stultify the essence of their contract, in which case they are void. But where the conditions, if assented to, are valid, it is generally held that one who without dissent writes his message on a paper fairly exhibiting those conditions cannot afterwards be heard to say that he did not assent to them. The weight of English authority is *pari materia* is to the same effect.

There is a marked difference between English and American jurisprudence as to the rights of the receiver of a message. According to our authorities he cannot sue for loss sustained by reason of any telegraphic error: not on the contract, for he is no party to it; not for deceit, for the indispensable element of bad faith is wanting; not for negligence, because the negligence, if it exists, is wholly in and about the performance of a contract, and to let a stranger sue for that negligence would be as much as to let him sue on the contract itself. In the United States the contrary opinion is received; Mr. Gray approves the result on grounds of public policy, but thinks the reasoning of our Courts difficult to escape. It may be worth considering whether the foundations of that reasoning have not been shaken by the Court of Appeal itself in the recent cases of *Heaven v. Pender* and *Foulkes v. Metropolitan District Railway Company*. Those cases give to 'the broad principle that a person must so conduct his business as not to injure others' a much wider application than English lawyers would have admitted a generation ago.

Mr. Gray is not quite so full on the topic of contracts concluded (or not concluded) by telegraph. In particular, he does not discuss the point, unsettled in England and for aught we know in America, whether the revocation of an acceptance, despatched by telegraph after the acceptance has been despatched by post, and in fact arriving before it, is or is not effectual.

The style of this book deserves hearty commendation. Mr. Gray might easily, without exposing himself to the charge of book-making, have produced a cumbersome volume loaded with extracts from reported judgments and abounding in unresolved contradictions. He has chosen the more difficult and worthier part, and the volume he has given us is systematic, concise, and readable. 'Book-making' means, paradoxically enough, putting together a thing that looks like a book and is not a book. This is a real book.

F. P.

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*The European Concert in the Eastern Question.* A Collection of Treaties and other Public Acts. Edited, with Introductions and Notes, by THOMAS ERSKINE HOLLAND, D.C.L., &c. Oxford: Clarendon Press. 1885. 8vo. 358 pp.

THIS is a very valuable work. Within the compass of a volume of convenient dimensions Professor Holland has contrived to place before his readers a complete documentary history of all the diplomatic transactions relating to the process of disintegration to which the Ottoman Empire has been subjected in the course of the last sixty years. Those who in search of the Acts concerning it have toiled through dispersed and fragmentary blue books, the bulky tomes of the 'British and Foreign State Papers,' and

the labyrinth of treaty collections fearfully and wonderfully constructed by G. F. de Martens and his continuators, can appreciate Dr. Holland's useful labour, which has enabled the ordinary reader not living in a great library to carry in his hand the authentic records of the Eastern Question. Without more trouble than that of turning over 358 pages he can now, thanks to the learned compiler, follow the course of interventions deprecated and effected, of revolutions deplored and sanctioned, of promises frequently renewed and never performed, of guarantees solemnly given and seldom fulfilled, of encroachments upon assured independence, and of the dismemberment of territories, the maintenance of the integrity of which has been, as all the world knows, an object of special solicitude to the Powers of Europe.

The plan of the work seems a judicious one, although some persons may perhaps regret that the stumbling-block of an Appendix could not have been avoided. The matter is methodically arranged in divisions, each of which contains a succinct historical view of the dealings of the Porte and the Great Powers in the settlement of one of the branches of the Eastern Question, followed by the Texts of the Treaties, Protocols, and other Acts belonging to the subject, together with copious notes necessary for their elucidation.

After a general introduction, we come to the affairs of Greece from 1826 to 1881, which are treated in Chapter II; the Protocol of 1826, the tripartite treaty of 1827, the decennarian conference of London, the creation of the new kingdom, the Protocols and Conventions establishing the Bavarian dynasty on the throne, and those which thirty years later disestablished it in favour of a new dynasty, the generous but unwise abandonment of the British Protectorate of the Ionian Islands, the Berlin Protocol, and the mediation imposing upon the Sultan, with doubtful justice, the territorial cession finally concluded by the Convention of May 24, 1881. The eighteen pages of Chapter III are sufficient for Samos and Crete, the troubles and the administration of which classical islands have ceased to excite a very lively interest among Britons. More attention will be paid to Chapter IV, in 116 pages, on Egypt from 1839 to 1885, from Mehemet Ali to Tewfik, from the political complications which were cut through by the Convention of London of July 15, 1840, to the financial embarrassments which have not yet (July) been removed by the Convention of London of March 18, 1885. Here Dr. Holland renders great assistance to any one who may endeavour to comprehend the respective rights, or pretensions, and the relative positions of the Sovereign Sultan who is not allowed to exercise sovereign power, of a quasi-independent ruler who depends for his existence upon foreign support and who cannot rule, of the foreign Powers great and small, of the International Courts, and of the bondholders. The whole series of Acts bearing upon these matters is set out, both those documents which have present force, and those which have only historical importance. It seems worthy of consideration, however, whether in any subsequent edition their arrangement might not be improved by placing under the head of 'Texts' the Convention of July 15, 1840, which now appears in the introductory portion of the chapter.

Next in order, the disturbances of the Lebanon, and the regulations adopted for its administration, occupy the fifth chapter. The nature of the contents of the sixth and concluding chapter, headed 'The Balkan Peninsula,' &c., is indicated by the words of the opening paragraph: 'In the preceding chapters we have traced the gradual emancipation, under the supervision of Europe, of isolated outlying portions of the Ottoman

Empire. We now approach a larger subject. During the last thirty years the Powers have assumed to deal with the central mass of the Empire; pruning it of its appendant tributary provinces, and recognising them under various conditions as independent states; readjusting its frontiers; regulating its waterways; and even supervising the details of its local administration.' All these topics are embraced in a comparative review of the settlements effected by the Treaty of Paris of 1856 with its subsequent modifications, and the Treaty of Berlin of 1878 with its supplementary arrangements. The Firmans of 1839 and 1856 on religious and political equality in Turkey, the Treaty of San Stefano, the Definitive Treaty of Peace between Russia and the Porte of 1879, the Cyprus Convention, and the Convention of 1879 concerning the Austrian occupation of Bosnia and Herzegovina, are given in the Appendix. Some not immaterial dates are unfortunately misprinted.

EDWARD HERRIES.

*Recherches sur quelques problèmes d'histoire.* Par FUSTEL DE COULANGES. Paris: Hachette et C<sup>ie</sup>. 1885. 8vo. iv and 530 pp.

IN an unpublished MS. of the English Chronicle, with a sight of which we have been favoured, the following passage occurs towards the end of the ninth century:—'On this year king Alfred sent clerks to Oxenaford to deem dooms of young men, as well earls' sons as churls', that would fain be judged of law-right worthy. And there they then offlew some six that spake idle speech of the Witan. And eke they did under the plough pass every one that made mention of the Mark System. And after that the land had good peace for a year.' Seriously, the Mark System has become a nuisance in our law schools; not by any fault of Von Maurer or Kemble, or the Bishop of Chester, or Mr. Freeman, but because researches intended for the use of scholars have been dragged into the routine of dogmatic instruction and examination. Those for whom Von Maurer wrote, and those for whom in the first instance our own scholars have written, can distinguish for themselves between facts proved by direct evidence, and hypothetical reconstruction of things whereof direct evidence is wanting. But the premature vulgarizing of historical theories effaces these distinctions; and we are producing in England—perhaps there is also being produced in Germany—a generation of secondhand retailers of learning who persuade themselves that as much is known of an archaic Teutonic land-community regulated by something called the 'mark system,' and with the same sort of warrant, as of the constitution of an English manor in the fourteenth century. This is a misfortune for learners, and unjust to the masters whose opinions are exaggerated and travestied. Certainly it is time for the superstition to be effectually checked. Mr. Seebohm's ingenious and popular book might, with more deliberation and caution, have answered this purpose. But Mr. Seebohm has himself fallen into the errors of under-rating the complexity of the subject and grasping hastily at large conclusions. His execution is unequal, sometimes crude; and he stands committed to gratuitous and extremely doubtful conjectures, which do not affect the value of his definite contributions to our understanding of English rural economy in the Middle Ages, but do give his work in its present form a character of temerity and paradox, and prevent it from taking rank with the classical productions of historical research. As for the lucubrations of Mr. Denman Ross (of Cambridge, Mass.; not of Harvard University or its law school), who thinks that *camporum spatia* can mean inclosures, and that *via* and *aquæ cursus* in legal documents import the ownership of the soil

of the road and the bed of the stream respectively, we should not mention them at all but for the fact that M. Fustel de Coulanges has thought fit to refer to Mr. Denman Ross in terms of something like approval. Now M. Fustel de Coulanges' own work in this volume of studies is that which hitherto we lacked—a serious and scholarly criticism on the current Teutonic theory, as for shortness' sake it may be called, of the village community. We hope in time to take the matter up more fully. Meanwhile we briefly note the chief points.

M. Fustel de Coulanges states the problem: 'Les Germains connaissaient-ils la propriété des terres?' This broad form of question is rather misleading, as the Teutonic school from Kemble and Von Maurer to Mr. York Powell have always affirmed that the free man's homestead was private property as far back as even conjecture reaches. However, M. de Laveleye says that the Germans as first known by the Romans were 'un peuple de pasteurs qui avait conservé les mœurs guerrières des chasseurs primitifs:' and M. Fustel de Coulanges does not therefore perform a superfluous task in proving that this is not what the Romans tell us. Cattle was the wealth of the Germans, but they were no more 'un peuple de pasteurs' than the Homeric Greeks. Tacitus does not commend their pastoral simplicity in not farming at all, but (writing for Italian farmers who had brought their business to great perfection) reproves their barbarousness in farming badly. In the much discussed passage of the *Germania*, c. 26, 'Agri pro numero cultorum,' &c., Tacitus meant to describe a system of farming; any light he throws on the nature of German land-holding is merely incidental. Otherwise he would have used a different set of terms. In M. Fustel de Coulanges' view, Cæsar does explicitly deny the existence of private property in land among the German tribes he knew, and his account cannot be harmonized with that of Tacitus. But how do we know that the customs of all German tribes—especially frontier tribes—were alike? It is reasonable to suppose that both Cæsar and Tacitus spoke truly according to their information. All this is most legitimate and useful criticism.

Again, M. Fustel de Coulanges points out that in archaic Germany we find not only slavery, but marked inequalities of rank among free men, and lords of land whose domains are tilled by their slaves. Any one who maintains the contrary—who states or assumes, for example, that the Teutonic village community was a pure democracy—must throw aside the clear witness of Tacitus. M. Fustel de Coulanges will hardly find any desire among English scholars at any rate to do so. Are not these things written for us in Kemble? and has not Sir Henry Maine carefully warned us that the archaic type of a village community is not democratic at all, but a close and jealous oligarchy?

Lastly, it is argued, and in our opinion proved, unless material documents have been overlooked, that there is no early authority for the use of the word 'mark' as a compendious synonym of 'village community,' as is done by Germans when they speak of *Markenverfassung*, *Markgenossen*, and the like, and in the imitative English term 'mark system.' The present writer had already formed the same conclusion as regards England. There is no more evidence that 'meare' ever could mean a township than that an English form of 'alod' existed. Nothing of the kind is discoverable in our authorities. It is proper and necessary that this point should be clearly brought out. But the words 'mark,' 'village community,' 'communauté agraire,' are only signs. To correct the misuse of one or another sign is not to dispose of the thing signified. We find that private ownership of land is very ancient in the Teutonic nations (and note, reader, that,

whatever popularizers and lecturers may have taught in their names, Von Maurer and Kemble were quite well aware of this): we also find, as documents increase in number and detail, a mass of custom seeming to be derived from a still greater antiquity. People in the eleventh or twelfth century knew just as little of the actual origin of these customs as we do; as regards any means of comparative study, they knew much less. If at that time they already regarded rights of common and the like as being always (what in some cases they undoubtedly were) *iura in re aliena* exercised over the land of a lord having the *dominium* of the soil, that would go far to suggest, if we did not know it already, that they had come under the influence of Roman legal ideas. But for the remoter historical inquiry it is simply indifferent. Which is older, the common-field system or the lord? By the common-field system we do not mean a hypothetical constitution of a hypothetical community, but a form of agriculture which visibly existed in fact within living memory. That is the real point to be worked out. Much of the evidence is obscure or fragmentary; much is ambiguous. It would be foolish to affirm that Von Maurer or any one else has said the last word. Only we do not hold it proved, or likely to be proved, that the work of the Teutonic school is all in a wrong direction. Advocates of a primitive *dominium* have some isolated but stubborn points to get over, besides the general suspicion of the idea being developed under Roman influence. We will just mention one or two of these points: the Salic law *de migrantibus*: the edict of Chilperic as to the rights of *vicini*: and the curious rule of English law, known to be as old as Domesday, that a manor cannot exist without free tenants.

Recent studies, the work before us among others, tend in our opinion to show that the English evidences are of even greater importance for the general problems of Germanic institutions than has been hitherto supposed.

Another important essay, 'Organisation judiciaire chez les Francs,' must be reserved for discussion on some future occasion. Meanwhile it seems to us that, if M. Fustel de Coulanges has offered probable corrections of more than one strained or fanciful inference from the Salic or other texts, there is such a thing as anti-Teutonic no less than Teutonic *parti pris*, and the learned author has allowed himself to be misled by it into captious narrowness. In the face of the hundred existing in England at this day, it is really too much to say that *centeni* in Tacitus means nothing in particular; in the face of the sharp distinction between the king's jurisdiction and that of the county court, still quite alive with us in the sixteenth century, it is really too much to say that such a phrase as 'ante regem aut in mallum' points only to the difference between a court held by the king's officer and a court held before the king himself.

F. P.

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*Lectures on the Law of the Constitution.* By A. V. DICEY, B.C.L.,  
Vinerian Professor of English Law. Macmillan & Co. 1885. 8vo.  
398 pp.

THE new Vinerian Professor at Oxford has published the course of Lectures on the Constitution with which he so amply justified his selection to that office. Mr. Dicey brought to the Chair in the University, not only long experience in the Temple, but his practical authority as the writer of one of the most important legal text-books of our day on the law of Domicil. His present volume he calls an introduction to, not an outline of, English Constitutional Law. Its design is to prepare students of our constitutional

system with a true conception of its dominant principles, and to enable them to look at the constitution from a scientific point of view. The study of the constitution, some practical understanding of which every Englishman obtains from our Parliamentary interests, is not in any strict sense at all an easy subject. Not only does there not exist any scientific commentary on this part of our law, but it is a curious fact that no systematic account of it exists in any language. We have the sonorous, but somewhat obsolete, sketch of Blackstone, wherein neither the name nor the substance of 'constitutional law' is to be found. We have the excellent but unsystematic disquisitions of Hallam; we have the acute analysis of Bagehot from the point of view of the modern politician; and we have exhaustive historical accounts of the origin and development of our institutions by Professor Freeman and an accomplished school of historians. But Blackstone (be it said with reverence) used language which in the mouth of a modern politician would be called the views of 'a man up in a balloon.' Bagehot, suggestive as he is to the daily working of politics, has neither the tone nor the case-learning of a practical lawyer. Our foreign commentators too often speak of our institutions with the bewildering manner of men who to us seem to be using a different set of terms and axioms. And our invaluable school of historians are not professional lawyers, nor much interested in the inner life of our political movement. The consequence is that a serious student of this branch of law is embarrassed and misled. He finds in Blackstone, Burke, Macintosh, and Hallam big propositions which it seems hard to reconcile with the analytic tests of Bagehot and the criticism of foreign publicists, and which sound incomprehensible if he compares them with a speech of Mr. Chamberlain or of Lord Randolph Churchill. He accordingly turns more willingly to the fascinating study of the *Origines*, and what is now called the Embryology, of our institutions. And if you question a young lawyer fresh from the Universities about the working of the State system, you will get a great deal from him about the Jutes and the Village Communities of many races, but almost nothing about the Army Act, or the Appropriation Act; and it will be possible that he never heard of Wolfe Tone's Case or *R. v. Pinney*. It is not too much to say that Professor Dicey's new volume for the first time connects and elucidates these different points of view. This admirable course of lectures is really an introduction to the study of the Constitution. For the first time we have it examined from the point of view of the comparative jurist, the historian, the politician, and the practical lawyer. He shows us why there is no systematic account of the English State system, and where lie the singular difficulties that hinder such a work. He shows us why Blackstone's propositions are in a literal sense preposterously untrue, and yet how very rash it would be to recast his words so as to be strictly in accordance with the facts of our day. He shows us the point at which the mere history of the constitution ceases to be instructive and becomes a fresh source of confusion. And he shows us how it comes that profound foreign publicists seem to use a language about the State which is unknown to the English lawyer.

The striking note of Mr. Dicey's teaching is that he is always first and foremost an English lawyer. That central hold on his subject he maintains without flinching. Theories, subtle and just, he gives us; but he never forgets that he is a lawyer training lawyers. This is an absolute condition precedent to those who will learn to understand our English polity. A jurist, a publicist, a politician, a philosopher perhaps, might treat exhaustively the State system of France, Germany, Switzerland, or the

United States. But the English Constitution is in a peculiar sense the province of the English lawyer. It rests on a mass of uncodified precedent, partly pure case-law, partly parliamentary practice: the whole of which is not to be found in any methodical document or set of documents, and the interpenetration and coordination of which can hardly be followed except by a lawyer trained in English courts of justice.

The distinctive feature of Mr. Dicey's method as a jurist is that he keeps continuous hold of the analogies presented by foreign systems. He shows us at every step how fundamentally the English State system differs from every known type of constitution, in its entire absence of anything corresponding to a constitutional code, to 'organic' laws, to 'administrative law,' to official irresponsibility; and in the peculiar character of our sovereignty of Parliament, of the 'control of the purse,' and of what are called elsewhere our 'constitutional guarantees.' This is a work, sorely needed, which has never been done before. The true differentia of the English system has never been adequately seized; and so English and foreign publicists have never used a common juristic phraseology. Foreign observers, deeply as they have studied English institutions, never have perfectly understood them, since they wanted the training of an English lawyer. English lawyers have usually been indifferent to the *causa causans* of foreign systems; and even our historical school, so keenly interested in the democratic constitutions of foreign nations, have studied them more with an eye to the Witenagemót than to the Cabinet, the High Court, and the Privy Council of to-day. Mr. Dicey seems to have been the first to examine our institutions with a combination of the resources which are now opened to us by scientific jurisprudence and history, and the combined training of a practical lawyer and politician. We recommend his original and instructive essay to the public as well as to the student. And we hope he will one day give us that *opus valde desideratum*, a systematic view of the English Constitution.

F. H.

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*Elements of Law considered with reference to principles of General Jurisprudence.* By WILLIAM MARKBY, D.C.L. Third Edition. Oxford: Clarendon Press. 1885. 8vo. xii and 439 pp.

DR. MARKBY's book is a critical and a stimulating one. It boldly calls attention to difficulties in the definition and application of legal conceptions which the text-books of common practice either wholly pass over or meet with unsatisfactory conventional solutions. The experience of nearly fifteen years' use has shown that even in elementary books this intellectual honesty is in the long run the best policy. We may be permitted to regret that in certain places Dr. Markby has not thought fit to go beyond the function of negative or sceptical criticism and undertake the work of positive construction. The value of the critical discipline remains the same. And perhaps it is on the whole a fortunate accident that Dr. Markby, writing as he did in the first instance for Indian students, assumed the position of one looking upon English law from the outside. We could wish, for our own pleasure, that he loved Austin less and the Common Law more: for we think nobly of the Common Law notwithstanding its obvious defects, and in no way approve many of Austin's opinions. Austin did much good in this country by fostering the ideal of a science of law: but he was not a great or even a good lawyer, and it is nothing less than absurd to treat him at this day as a writer of authority. It is hardly fair in 1885 to tell students that lawyers persist in using the phrase 'malice in law,' when in 1882

Lord Blackburn expressly declined to use it: see *Capital and Counties Bank v. Henry*, 7 App. Ca. at pp. 771, 772, 787. It is better, however, for law-students to start with a censorious bias than with a servile one.

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*The Modern Law of Real Property, with an Introduction for the Student and an Appendix of Statutes.* By LOUIS A. GOODEVE. Second Edition. London: W. Maxwell & Son. 1885. La. 8vo. xlviii and 661 pp.

THE plan of this work is well conceived, and is calculated to place the subject before the student in a new and useful way. The student will find the book both readable and easy, and will gain a pleasant introduction to some of the chief points which the practising conveyancer has to bear in mind. The text bristles with copious extracts from Littleton, Coke, Blackstone, Acts of Parliament, and reported cases. These extracts, to which great prominence is given, are in our opinion both too numerous and too long; they probably fill more than 100 of the 400 pages of text; indeed, that is not all, for the author has set out in an Appendix ten Acts of Parliament and some Rules of Court, thus adding 200 more pages of extracted matter. It seems a little out of proportion in a work on Real Property Law to give three pages to the Probate Act and only four to Copyholds.

We notice some mistakes which ought not to be found in a revised edition of a work recommended to students by the University of Oxford and the Council of Legal Education. For instance, the personal property of an intestate is not distributable among the next-of-kin of the deceased as stated on p. 16, but among the persons entitled under the Statutes of Distribution (*Stewart v. Stewart*, 15 Ch. D. 539); sect. 25. (6) of the Judicature Act, 1873, relates only to *legal choses-in-action* and to assignments *not purporting to be by way of charge only*, but the author does not (p. 9) mention either of these limitations; the determination of a lease granted by a tenant for life does not, as is stated at p. 47, give the lessee any right to relief under 14 & 15 Vic. c. 25, which relates only to determination caused by the death or ceasing of the estate of a landlord entitled for his life or for any other uncertain interest; and lastly, the Statute of Frauds did not make the attestation by three or four witnesses necessary to the validity of a will (as is stated on p. 92 and not corrected on p. 332), although it did to the validity of devises and bequests of lands or tenements. There should be on p. 41 a reference to 42 & 43 Vic. c. 59. s. 3, which abolishes outlawry in civil proceedings; and the case of *Burgess v. Wheats*, 1 Wm. Blackstone, 133, should have been dealt with.

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*The Duty and Liability of Employers.* By WALWORTH HOWLAND ROBERTS and GEORGE WALLACE. Third Edition. London: Reeves & Turner. 1885. La. 8vo. xlviii and 551 pp.

THE third edition of this useful book is so greatly enlarged and altered that it is in many respects a new work: a course fully justified by the growing importance of the subject.

Much of the law relating to the liabilities of employer and employed is of very modern origin. Thus no less than 200 pages of this volume are taken up with questions arising more or less directly out of the Employers' Liability Act, 1880.



It may be still not commonly known that the doctrine of 'common employment,' which the Act of 1880 has not destroyed, but honeycombed with exceptions, is a very recent product of case law<sup>1</sup>. The first evidence of any such rule is in *Priestley v. Fowler* (3 M. & W. 1), decided as recently as 1837. The following is a judicial statement of the accepted form of the rule: 'A servant when he engages to serve a master undertakes as between himself and his master to run all ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both.' (Per Erle C.J. in *Tunney v. Midland Railway Company*, L. R., 1 C. P. p. 296.)

An exception to the rule has been sometimes allowed (oftener in America than in England) where the servant causing the injury has been invested with more extensive authority so as to occupy the position of a vice-principal (Op. cit. p. 186): and this distinction has been lately recognised by the Supreme Court of the United States in the case of an injury to a railway servant caused by the negligence of the conductor of a train (*Chicago, Milwaukee & St. Paul Railway Company v. Ross*, 112 U. S. 377).

The Act of 1880 is an experimental and temporary one, but will doubtless be continued or re-enacted, and probably be made somewhat less timid. It is perhaps too much to hope that it may be recast as a clear positive statement of the law. The form in which it now stands, of exceptions to a rule not stated, and these qualified again by minute conditions and sub-exceptions, is most unsatisfactory.

The work before us is readable and full of general interest, and some of the cases referred to are very curious. Thus *Hart v. Lancashire & Yorkshire Railway Company* (21 L. T. 261) would seem more likely to have formed the thesis in some exercise in casuistry than the subject of a modern action at law. In this case a pointsman, having but an instant to decide what to do with a runaway engine, turned it into a siding on which there was a train at rest rather than allow it to meet an advancing train. A passenger, injured by the consequent collision, sued for damages; and after some vacillation it was held that there had been no negligence on the part of the Company. But *quaere*, per Bramwell B., whether the pointsman's act, though morally blameless, was not a trespass?

Another important and valuable chapter is that on the effect of death upon rights of action: a branch of law often little understood. The general rule of the Common Law is expressed in the maxim (suspected of being no better than a corrupt following of misunderstood Roman law), 'Actio personalis moritur cum persona.' But the exceptions, statutory and otherwise, are important and not free from difficulty. They are here dealt with in a clear and useful manner. Last, not least, the book is well indexed.

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*The Law relating to Building, Building Leases, and Building Contracts, with a full collection of Precedents; together with the Statute Law relating to Building, with Notes and the latest Cases.* By ALFRED EMDEN. Second Edition. London: Stevens and Haynes. 1885. La. 8vo. lxxiv and 947 pp.

THIS second edition of Mr. Emden's work has attained to considerable size and has reached 900 and odd pages. To a large extent this arises from the introduction of a considerable quantity of fresh subject-matter, such as

<sup>1</sup> Law Quarterly Review, ante, p. 120.

the chapters on Light, Gas and Water, Party-walls, &c. In adding chapters on some of these subjects, such for instance as Party-walls, Mr. Emden has been well advised. His work does not pretend to any scientific or logical arrangement; it is a collection of legal rules and observations on all sorts of subjects connected with buildings, from mortgages of complete houses to extras in building new ones. Hence, the more material can be packed into its pages, the better for the practitioner who wants to find a case or a dictum on this point or that. But still, some of the additions seem hardly wise. Thus the chapter on Gas and Water is too short to be of much practical use. Such a note as this, for example, tells us almost nothing: 'As to taking up pavements, see London and Blackwall Ry. Co. v. Limehouse, 26 L. J., Ch. 164. See cases in Michael and Will's Gas and Water (3rd ed. p. 15).' It is scarcely the function of one text-book on a technical subject to refer us to another, and when a case is cited it is advisable to tell us the result of the decision. Again, we regret to find that Mr. Emden has allowed himself to publish a second edition of his work without any material improvement in style. For the sake of his own reputation and of English legal literature every author who reaches a second edition should take pains over his diction. Mr. Emden writes, for example: 'So in building contracts which the builder agrees to complete by an appointed day.' What does he agree to complete? Not the contract, but the work. This, again, is at best a clumsy sentence: 'A consideration of the judgments in this decision will serve to show how perplexing some of the dicta and cases on penalty and liquidated damages are.' One more criticism, and we have done. The cases are piled up in the notes without distinction. There is no advantage in a practice still common, but reprehensible, of citing a number of cases to the same effect, for as long as a statement is adequately supported by a sound decision, nothing more is required: and, on the other hand, if the different cases raise doubts or exhibit distinctions, it is the business of the text-writer to indicate that specifically. Thus to defend the rule, now elementary, that there must be a substantial deprivation of light to give a right of action, no less than seven cases are cited, beginning with one in *Carrington and Payne's Nisi Prius Reports*, and ending with *Ecclesiastical Commissioners v. Kino*, 14 Ch. D. 213, decided by the Court of Appeal in 1880. Inasmuch as this last case is a sufficient guide to the earlier authorities, it would have been better to cite it alone. Notwithstanding these defects of form, we are bound to express our opinion, based on practical use of the book, that Mr. Emden's work will many times be of service to those who have to do with building cases, and also forms a useful compendium for architects and others who are not lawyers.

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*A Treatise on Banking Law.* Second Edition. By J. DOUGLAS WALKER. London: Stevens and Sons. 1885. 8vo. 396 pp.

ALTHOUGH this book has reached a second edition, it is not yet one which can be placed above the common level of text-books. The earlier part consists of a brief summary of the leading provisions of the statutes relating to Banking. The latter part consists of a statement of the law contained in the decided cases with which bankers especially are concerned. The statement, though correct, is not always discriminating. It is said, for instance (p. 40), 'There is nothing of a fiduciary character in the relation of banker and customer with respect to the money paid by the customer to his account; consequently a bill in equity would not lie to recover the money so

paid (*Foley v. Hill, &c.*):' which is true, but the old practice is now material only as showing that the banker is not a trustee of the money. In speaking of forged signatures and endorsements to a bill (pp. 146, 148) being inoperative, it seems an omission not to have dealt with the apparent exception to the rule in *London & South Western Bank v. Wentworth*, 5 Ex. D. 96; where the circumstance that the name of both drawer and indorser were forged was held immaterial in an action by a bonâ fide holder against the acceptor, who had accepted the bill in blank for the purpose of its being negotiated.

The chapter on 'Appropriation of Securities,' which is new in the second edition, is perhaps the best in the book. It concludes with a clear statement of the English authorities founded on Lord Eldon's decision in *Ex parte Waring*, and contrasts the English rule with the rule of Scotch law as enunciated by Professor Bell, and maintained by the House of Lords as a Scotch Court of Appeal in the case of *Royal Bank of Scotland v. Commercial Bank*, 7 App. Ca. 366.

The Appendix, containing selected sections from the Statutes, is now brought into reasonable bulk; but this, as well as the text, would be more useful if the Index had been fuller, and particularly if the number of primary headings had been considerably increased. For instance, we do not find either 'equitable assignment' or 'assignment,' and have to look for both under 'cheque.' For 'crossing,' likewise, we must hunt under 'cheque,' which occupies three pages of index. 'Negociable' is not indexed, and it would be easy to add numerous instances.

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*Étude sur Gaius et sur quelques difficultés relatives aux sources du droit romain.* Par E. GLASSON. Nouvelle Édition, complètement refondue. Paris: Pedone-Lauriel. 1885. 8vo. 329 pp.

M. GLASSON writes with erudition not inferior to that of the German masters of Roman law, and with the lucidity natural to an educated writer of French. His work is also distinguished by a good sense and judgment not always to be found in German monographs. The conditions of German academic work are in many ways better than ours, but they tend to foster hypercritical ingenuity and paradoxical invention. M. Glasson will be found to supply a wholesome corrective now and then. He tells clearly and carefully all that is known or reasonably conjectured (not omitting to mention for confutation things unreasonably conjectured) concerning Gaius and his work. Perhaps the book goes rather too much into detail for beginners, but it may safely be recommended to advanced students of Roman law. To give a notion of M. Glasson's thoroughness, we call attention to his chapter *à propos* of Gaius' lost book *ad Edictum provinciale*; this chapter is really an historical and critical essay on the whole subject of the prætorian law, and takes account of e.g. such recent additions to its modern literature as Lenel's reconstruction of the *Edictum Perpetuum*.

M. Glasson refers to an article in the *Edinburgh Review* of December, 1828 (not 1823, as printed in his reference), as disputing the attribution of the Institutes of Gaius, as and for which the contents of the anonymous Verona palimpsest have been unanimously received ever since Niebuhr's discovery. The article in question is mainly *de re diplomatica*, the discovery being used in order to illustrate the importance of palimpsests. We are by no means sure that the writer was a lawyer at all; and it seems to us that

M. Glasson has taken a page of mere banter at the expense of German scholarship (the taste of which we are not concerned to defend) for a serious argument. In any case, M. Glasson may be assured that this 'opinion curieuse d'un jurisconsulte anglais,' if such it were, did not produce any effect in this country. We should have been glad to find something more about Mr. Muirhead's workmanlike and scholarly edition of Gaius than the very slight notice which M. Glasson gives to it. And the estimate of the jurists' Latinity is something too rose-coloured. 'Tully, my masters! Ulpian serves his need,' exclaims Mr. Browning's bishop of the Renaissance, and rightly enough from the purely Humanist point of view. English students have a safe guide in Mr. Roby on this matter.

*A Concise Treatise on the Law relating to Sales of Land.* By AUBREY ST. JOHN CLERKE, of the Middle Temple, Barrister-at-Law, and HUGH M. HUMPHRY, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons. 1885. La. 8vo. lii and 586 pp.

THIS is a very creditable book. It is well arranged, well indexed, capably printed, and so thoroughly brought down to date as to contain the cases reported in the Law Reports for May, the very month in which it appeared. The authors seem to possess a peculiar power of combining conciseness with completeness. As a good specimen of the character of their book, we may refer to the way in which they have treated the subject of apportionment of rent (p. 90). They should also have credit for legal acumen in their criticism and disapproval of the decision in *Re Johnson and Tustin*, 28 Ch. D. 84, for that decision has been reversed by the Court of Appeal on the grounds indicated by Messrs. Clerke and Humphry (p. 190) as the true construction of sect. 3. suba. 6 of the Conveyancing Act, 1881.

It may be doubted whether the statement on p. 192, that 'where the abstract shows a good equitable title in the vendor, with power to get in the legal estate, whether under the Trustee Acts or otherwise, it is unnecessary for the abstract to show the devolution of the legal estate,' is not put rather more strongly than the authorities warrant. And we should certainly have expected to find on page 164 a reference to Ord. l. r. 10, as to the conduct of a sale by the Court. The omission must be a slip. But on the whole we may express an opinion that this book will prove a most formidable rival to the best books hitherto published on the same subject.

*The Law of Money Securities.* By C. CAVANAGH. Second Edition. London: William Clowes & Sons, Limited. 1885. La. 8vo. lxvii and 805 pp.

THE term 'Money Securities' is perhaps somewhat ambiguous, but it is employed by the author in the widest sense; and the title covers a treatise upon borrowing of every kind. Man may almost be defined as a 'borrowing animal,' and it follows that the subject indicates dealings with property of every description. Thus we pass in rapid succession from the law of post-office orders and circular letters of credit to that of mortgages of freeholds, and thence to the customs of the Stock Exchange, so far indeed as the customs of that commercial Alsatia can be said to be the subject of law.

Notwithstanding the wide scope of the work, Mr. Cavanagh finds space to discuss here and there some rather minute points at considerable length. Thus he combats with some warmth and boldness the decision of the Court

of Appeal in *Sutton v. Sutton*, L. R., 22 C. D. 511, and finally concludes that the interpretation placed by that Court on 37 & 38 Vict. c. 57. sect. 8 is neither literally, grammatically, or legally correct.

We do not intend any disparagement when we say that the subject of the work is almost too wide, and that the enquirer may therefore be obliged to have recourse to more special works when he has seriously to investigate one of the many complicated questions arising on rights and priorities among borrowers. What the author has given us is a readable and interesting work, and one which will put such an enquirer upon the right track; and the fact that it has reached a second edition shows that it is found useful.

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*Modern Legislation for Seamen and for Safety at Sea.* By E. S. ROSCOE, Barrister-at-Law. William Clowes and Sons, London. [1885.]

THIS is a small pamphlet containing two articles which have appeared in recent numbers of the *Law Times* newspaper. The legislation described begins with the Merchant Shipping Act of 1884, that marvel of swift legislation which, with its 548 sections, passed through Committee in one day. Mr. Roscoe gives a slight but tolerably complete sketch of those parts of this Act, and of subsequent Acts, which are supposed to protect the lives of those who go down to the sea in ships. Enquiries into shipping casualties, testing of chain-cables, examinations and certificates for masters, engineers and mates, load-line, seamen's food wages and savings-banks, regulations for preventing collisions at sea, limitation of shipowners' liability, and last, but not least, Mr. Plimsoll, are amongst the subjects touched upon by Mr. Roscoe. Of all these we shall hear more when the evidence of Mr. Chamberlain's Committee now sitting is published. Of the practical efficacy of much of this legislation we confess that we have not a high opinion. However, there it is, and, as Mr. Roscoe says, the sooner it is codified and put into an intelligible form the better. At present even lawyers are hopelessly bewildered by the multiplicity of Acts.

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*A Treatise on the Law of Dower.* By CHARLES H. SCRIBNER. With additional Notes and References, by ALFRED I. PHILLIPS. Philadelphia: T. & J. W. Johnson & Co. 1883. La. 8vo. 2 vols. 969 and 860 pp.

IN this book the author has collected and arranged in a convenient form the rules and principles of the law relating to the right of Dower; a subject which occupies (as he states) a prominent and important place in the American Law of Real Property.

The author discusses not only the Law of Dower strictly so called, but also the Law of Marriage and Divorce, the Law of Alienage, and some important questions arising on other parts of the Law of Real Property. He also discusses the rules of the Common Law pertaining to these matters. As the discussion, generally speaking, takes an historical form, the work may occasionally be found useful to the English lawyer, as well as to the American practitioner for whose use it is primarily intended, not only in cases relating to the American Law of Dower, but also in cases governed by the English law. See, for example, chapter xiv, 'Dower in Determinable Estates.'

*A Complete Collection of Practice Statutes, Orders, and Rules.* By ALFRED EMDEN and E. R. PEARCE-EDGUMBE. London: Stevens and Haynes. 1885. La. 8vo. lxvi and 1378 pp.

THE comprehensive title of this work of practice creates expectation, and it is no mean praise to say that the performance fairly equals the promise. Aiming at completeness, the author goes back to early times, and with something of affectation commences with the statute 3 Edw. I. c. 35 (A.D. 1275), against champerty and embracery. Then (Op. cit. p. 4) he gives us the statute 3 Edw. I. c. 29, to the effect that if 'a pleader beguile the Court' he shall be imprisoned for a year and a day. These and similar Acts would be searched for, if wanted, elsewhere, and they seem therefore somewhat out of place among the Rules and Orders of the Supreme Court.

It is a good point that besides the Statutes, Rules and Orders, Mr. Emden gives the Notices issued by the Registrars and like authorities; a kind of information often difficult to find. Thus we found the Registrar's notice directing the usual addition to the title of an administration action set out here (Op. cit. p. 1136), though we had sought in vain elsewhere.

We must add that we wonder at what George Eliot calls the 'physique' of the book. Probably the publishers know best, but a division of this somewhat cumbersome work into two moderate-sized volumes would have seemed more convenient for the public.

*Voters and their Registration.* Comprising the Representation of the People Act, 1884; the Registration Act, 1885; the Redistribution of Seats Act, 1885; and the Medical Disqualification Removal Act, 1885; with Notes and Index. By JOHN JAMES HEATH SAINT, Recorder of Leicester. London: Butterworths. 1885. 8vo. xvi and 290 pp.

THE practical demand which calls forth this work is evident. Mr. Saint's book has the merits of conciseness and handiness, and a generally workman-like air. More we cannot say until we have obtained a report of its utility in the hands of those persons (not necessarily lawyers) who will have most occasion for it.

*The Student's Guide to Pridgeaux's Conveyancing, &c.* By JOHN INDERMAUR. Second Edition. London: George Barber. 1885. 8vo. 117 pp.

*The Student's Conveyancing:* being specially intended for the use of Candidates at the Final and Honors Examinations of the Law Society. By ALBERT GIBSON and ROBERT McLEAN. London: Reeves and Turner. 1885. La. 8vo. lx and 552 pp.

MR. INDERMAUR'S manual is a neat little book, and looks as if its success (for it has quickly reached a second edition) was well deserved. Pridgeaux and his commentators are to the present writer, who was brought up in the school of 'Davidson's Conveyancing,' *diversae scholae auctores*, and we therefore do not enter on minute criticism. We notice with some surprise a suggestion, very properly cited by Mr. Indermaur only to be dismissed, that an infant's contract for the purchase of land is affected by the Infants Relief Act of 1874.

Messrs. Gibson and McLean's work is more ambitious. The authors observe that most existing books of conveyancing 'are increased in bulk

and cost by precedents and forms, which in our experience the average law student seldom or never reads.' If such is the fact, the average law student will never be a sound lawyer, and we are sorry for him and his future clients. And if he relies on Messrs. Gibson and McLean, or any other instructors whatever, however industrious and ingenious, to enable him to dispense with knowledge of the actual operative forms and authentic texts of the law, the latter end of him will surely be confusion. It is however possible, not probable, that he may in this manner pass his examinations with a little less trouble, much more risk, and a total loss of ultimate profit. We are far from saying that books of this kind may not be valuable when rightly used, that is, as a guide to the authorities, not a substitute for them. In which manner Messrs. Gibson and McLean expect or desire their book to be used is not quite clear to us. We notice one or two misprints in the names of well-known cases.

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*La Femme et le Droit. Étude Historique sur la Condition des Femmes.*  
Par LOUIS BRIDEL. Paris and Lausanne. 1884. 8vo. 148 pp.

M. LOUIS BRIDEL is of opinion that J. S. Mill's 'Subjection of Women' 'peut être considéré à bon droit comme l'un de ces ouvrages nobles et rares qui restent à l'éternel honneur de leur siècle et de leur auteur.' This will sufficiently indicate the general tone of his work. Writing for French readers, M. Bridel points his most detailed and severe censure at the provisions of the Code Napoléon relating to marriage, adultery, and *séparation de corps*. These provisions were a reaction from the short-lived legislation of the Republic, which aimed at complete equality. Divorce was allowed by the Code as it first stood, but one of the first acts of the Bourbon restoration was to suppress it, and it was re-established only the other day. M. Bridel has no difficulty in showing that the French Code is less favourable to women than any other modern European system; but we do not think his manner of argument is likely to make much impression on readers who are not already predisposed to agree with him. A better acquaintance with English law, of which M. Bridel's knowledge is evidently slight and second-hand, would have enabled him to strengthen his case, and to avoid some exaggeration elsewhere in speaking of the advances, great as they certainly are, made on the old common law of husband and wife by modern American legislation. Some of his general statements about European institutions would also have been altered or qualified. We do not allude to the Married Women's Property Act of 1882, which is not noticed at all in the text: M. Bridel is aware of its existence, and explains in a short preface that his book has been in print for two years, and the publication has been delayed by accident. The historical and comparative part of the book shows a competent knowledge of the sources of information or speculation on the origin of the family and the like which have now become the common property of students. But we cannot say much for the writer's discrimination or impartiality. He is of the school for whom the tyranny of man is everywhere in history, and the desire of oppressing women the sole motive of legislators. 'La femme occupe une place très effacée dans l'histoire du peuple juif' is an odd thing to say of the nation which counts Rachel, Miriam, and Deborah among the prominent figures of its early legends, Esther among those of its revival, and which produced the brilliant romance of Judith almost with its latest breath of independence. And surely M. Bridel must have read *Athalie* at school; but then it is the

controversial economy of his party to say nothing about bad women of ability. Moreover, it is well known that the Genevess and the Vaudois deem themselves to speak and write much better French than the Parisians, so peradventure they do not read Racine at Lausanne. Again, we have heard of a heroine in the Book of Maccabees; but the Vaudois are Protestants, and perhaps, like some British Protestants, think that the habit of reading the Apocrypha is Popish and therefore sinful.

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*A Handbook of Public International Law.* By T. J. LAWRENCE. Cambridge: Deighton, Bell & Co. 1885. 8vo. xi and 120 pp.

THE Deputy Whewell Professor of International Law in the University of Cambridge has produced a very neat epitome of his subject, such as would be the result of adding a little finish of form to carefully prepared lecture notes. It ought to be of considerable value to teachers; but we could wish it were possible to keep it out of the hands of a certain sort of learners, who will carefully avoid extending their reading beyond it, and may peradventure suck out of unwary examiners no small advantage. Mr. Lawrence is probably not unaware of the danger, for he has wisely omitted to give specific references, which might be learnt by heart and used to make a false show of verified knowledge.

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*The Scottish Law Review and Reports of Cases in the Sheriff Courts, &c.* Glasgow: William Hodge & Co. Published monthly. No. 1, January; No. 7, July, 1885.

WE have received Nos. 1 and 7 of this series, of which we hope to see more. The enterprise of publishing, as collateral to the Reports of the Court of Session sitting at Edinburgh, reports of selected cases from the Sheriff-Courts and of decisions of the Court of Session on appeal from those Courts, is an extremely useful one. The decisions of the Court of Sessions in Scotland have, upon points where English decisions are inconclusive, been admitted as authority by judges of the Superior Courts in England. But it must be allowed that there are large classes of cases scantily represented in the ordinary reports of the Court of Session, on which the recorded decisions of the local judges, especially in the great commercial centres, will be extremely valuable. Having jurisdiction in civil cases (with certain exceptions) unrestricted in respect of money value, the Scotch acting sheriff acquires, in some classes of questions, an experience greater than that of many judges of the Superior Court. This extensive jurisdiction, with the addition of important criminal functions, tends to give to the ancient office of the sheriff a weight which the ability and learning of most of those who hold it is well calculated to maintain.

A class of cases in which the experience of the Sheriff-Courts will be found of general interest arises under the Employers' Liability Act. The principle upon which that Act is founded was suggested by the Scotch decisions before the importation by the House of Lords of the English presumption that the servant undertakes, as incident to his employment, all risks arising from the negligence of persons in the same employ; and it is interesting to see how the principle of the new statute is applied by the local courts of the country where it is indigenous.

So far as we can judge from the early numbers, the Scottish Law Review



gives promise of well carrying out the enterprise entered on. The original articles in the Review are chiefly of local interest, but are instructive as showing the topics which at present engage the attention of the various bodies of Scotch law-agents.

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*Powell's Principles and Practice of the Law of Evidence.* Fifth Edition. By JOHN CUTLER and EDMUND FULLER GRIFFIN. London: Butterworths. 1885. 8vo. xxxii and 732 pp.

POWELL'S *Law of Evidence*, which comes in length about midway between Stephen's *Digest* and Taylor on *Evidence*, has reached a fifth edition. It is shorter than its predecessor, mainly by reason of 'the Indian Evidence Act being taken out of the Appendix, and all references thereto being eliminated from the body of the work.' These omissions are justified by the Editors on the ground that 'there are now several text-books available on the Law of Evidence in India,' and no doubt the justification is good if the object is merely to present the reader with an account of the law of Evidence in England. On the other hand, inasmuch as the work would seem to be best suited for students—practitioners being supplied with all they want, in whichever form suits their taste, in the two standard works we have mentioned—it is perhaps a little to be regretted that opportunities of valuable collation have been lost. At the same time, the English law of Evidence requires only the amendment embodied in Lord Bramwell's Bill in 1884, and in the Government measure of 1885 (whose career was of the obscurest), to make it probably as nearly final as it is given to modern law on any limited subject to be. It is creditable alike to the ingenuity of the profession and to the industry of the Editors that the ten years which have elapsed since the issue of the fourth edition should have supplied no fewer than 330 fresh decisions on the law of Evidence. The devotion of a separate 'part' to written evidence is perhaps not altogether philosophical, as an oral statement, a marked paper, and a broken stick, are all alike objects perceptible to the senses of the jury; but it is of course not without its conveniences. The Appendix, in respect of statutes, rules, and forms, is highly meritorious, and the whole edition is calculated to maintain the reasonably high reputation of Mr. Powell's work. The Index leaves something to be desired. Neither 'Prisoners' nor 'Accused Persons' figure in it, while some pages are occupied by the heading 'Evidence,' under which, in a book on Evidence, no one in his senses would ever think of looking for anything. When will the editors of books on Evidence take notice of the extremely important provisions of sect. 4 of the Explosives Act, 1881?

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We have received the following letter from the learned Editor of the *American Law Register*:—

Philadelphia, July 17, 1885.

DEAR SIR,—In the notice of Mr. Eversley's *Law of Domestic Relations*, page 381 of the July Number of THE LAW QUARTERLY REVIEW, you say that Mr. (now Lord) Fraser 'conceived the plan of grouping the various subjects . . . under the title of the Personal and Domestic Relations.' 'Mr. Fraser's work . . . appeared in 1846 . . . and in the meantime have appeared the American works of Mr. Reeve,' &c. The fact is that Reeve's '*Domestic Relations*' was published in 1816, thirty years before Mr. Fraser's.

Judge Tapping Reeve, a Justice of the Supreme Court of Connecticut, established at the beginning of this century a Law School at Litchfield, Connecticut, which was I believe the first law school, *in its modern sense*, established anywhere for instruction of students in the common law. It was at least the first American law school, and obtained great fame, very many of the most eminent lawyers of the early half of this century in America having been pupils there. Reeve's 'Domestic Relations' was a *résumé* of his lectures in that school. It has gone through several editions, and still holds its own as a recognised text-book in this country, though Reeve himself died in 1823.

Whatever credit there is due to the conception of grouping the subjects under that title belongs to Judge Reeve, and not to Mr. Fraser.

Yours respectfully,

JAMES T. MITCHELL.

[The main purport of the letter speaks for itself, and we have only to regret the slip it points out. We should be glad to receive further information as to the origin and history of Law Schools in America, a matter of which very little is known in this country. It would be appropriate, now that there is something like a revival of systematic legal education.—ED.]

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#### NOTES.

WE are informed by the Rev. A. Hawkins Jones, of Bedford (who is a graduate in law as well as a clerk in orders), that the experiment of teaching law in a public school has been tried with considerable success. A class was formed at the Bedford Modern School last winter to hear a course of lectures on the Elements of the Law of Contract. Ninety boys attended, and the results were such, in the judgment of the teacher, as to show that fully half of them had followed the lectures with satisfactory intelligence. This confirms the truth of what Mr. Justice Stephen and others have for many years insisted upon—that law is in itself a deeply interesting subject, and in order to be generally recognised as such, only needs to be put before people in the right way. We should be glad to see the rudiments of our constitutional and institutional law systematically taken up in connexion with the teaching of English history. Not only English citizens, but English politicians, often go sadly astray for want of knowledge of this kind; and our current history-books themselves would be much better for more of it. The average handbook-writer, and consequently the average reader, is apt to think it an immaterial detail whether a man's head was cut off with or without a legal trial and sentence. Instruction on a special subject like the law of contracts is not so easily procurable; schoolmasters cannot be expected to add the laws of England to their other burdens. Constitutional law can be learnt and taught, to a considerable extent, from books alone, and is thereby distinguished from the current law that concerns men's common affairs. But where, as at Bedford, favourable circumstances make it possible, the enterprise is very commendable, and the example acceptable by way of a counsel of perfection.

The decision of *The Gas Light and Coke Co. v. Vestry of St. Mary Abbott's, Kensington*, in the Court of Appeal, 15 Q. B. D. 1, may be thought at first sight to do little credit to the law. But what it really shows is the absurdity of our methods—or want of method—of local government. If the wisdom of Parliament makes the gas-pipes under a public street the property of a private company, while it puts the duty of repairing the surface on the shoulders of a wholly different public body, collisions of interest must be expected to occur. The vestry may repair the road as they please—subject to the rights of the Gas Company. It may be that, in the present state of London traffic, they cannot repair efficiently at all without using steam rollers. But the Court has no jurisdiction to mould its interpretation of statutory rights by external considerations of convenience.

*Page v. Morgan* (C. A.), 15 Q. B. D. 228, re-affirms the principle which has been laid down in other cases that an 'acceptance' of goods which will satisfy the seventeenth section of the Statute of Frauds need not be such an acceptance as would preclude the owner from rejecting the goods on examination as not being equal to sample. The noteworthy point in the line of decisions, of which *Page v. Morgan* is the last, is that a matter which appears to belong to the most technical part of English law really illustrates the principles of general jurisprudence with regard to the nature of possession. The 'receipt and acceptance' required by the Statute of Frauds, taken together, amount to a transfer of possession. When a purchaser of goods 'actually receives,' there is a physical transfer of the goods. When he accepts them he shows the *animus possidendi*, in other words the 'possession of the goods' is transferred, and the rules as to the necessary acceptance are simply rules as to the *animus possidendi* required to affect such transfer. The moment the matter is looked at in this light, it is clear that possession may be transferred and the requirements of the seventeenth section be thus satisfied, without the possessor having adopted the position of owner. The statute is satisfied if there be a transfer of possession (actual or constructive) even though there be not a transfer of ownership. It would seem to follow that, as against a mere wrongdoer, the person who has 'received and accepted' within the Statute, even if he has not physical control of the goods, is entitled to bring trespass. This is now a speculative point in England, but it may be material in those common-law jurisdictions where the forms of action are still preserved.

In *Elliott v. Hall*, 15 Q. B. D. 315, it is held that the seller of coals who sends them to the buyer in a truck with a loose trap-door in it is liable to the buyer's servants if they go through the trap-door in the course of unloading the coals. This is a wholesome decision, and, though well within the existing authorities which distinguish persons 'invited to enter' upon property from mere licensees, will help to strengthen the law at a point where it was formerly much too weak. Perhaps it is not too much even to hope that the Court of Appeal will some day follow the leading New York case of *Thomas v. Winchester*, which, though regarded with a kind of suspicious fear by English commentators, is in our opinion very good law.

The decision of the Court of Appeal in *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750, may be taken as finally disposing of the opinion (in which the late Vice-Chancellor Malins stood alone among recent autho-

rities) that the burden of a covenant, not capable of being construed as a grant (as in *Morland v. Cook*, 6 Eq. 252), and not made between landlord and tenant, can run with land. It is true the Court did not say in terms that such a doctrine is legally impossible; but they did say in effect that they could not think of any case in which it would be applied. The case also confirms, if confirmation were needful, the recent decisions that where a covenant is not merely restrictive, but involves the active expenditure of money or money's worth, and does not run with the land at law, it is not within the principle of the decisions in equity which have enforced restrictive covenants against assigns taking with notice.

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An infant may be guilty of larceny as a bailee, though the goods were delivered to him on an agreement made void by the Infants' Relief Act: *Reg. v. McDonald*, 15 Q. B. D. 323. The ground taken is that there may well be a bailment without any contract. The infant at all events had a special property. But it seems to us arguable, moreover, that, the terms on which the goods were expressed to be delivered not constituting an agreement of which the law could take notice, the law must imply a contract on the infant's part to return the goods on demand, subject to a lien for any part of the hire or purchase-money which has been paid under the void agreement. Otherwise the infant may keep the goods for nothing, which is absurd.

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Where A. is B.'s agent to receive from C., in a certain event, money which C. could not be legally compelled to pay, but which he does not commit any offence or wrong by paying, or B. or A. by receiving it; and if the event happens, and C. does choose to pay the money to A.; there A. is not entitled, by reason only that C. was not compellable to pay, to refuse payment over to B. This does not appear difficult in principle, but the Court of Appeal has had to re-assert it in *Bridger v. Savage*, 15 Q. B. D. 363. In *Beyer v. Adams*, there overruled (and most properly not reported by the authorised reporter), Stuart V.C. appears to have fallen into the error of supposing a wagering agreement to be not only unenforceable but illegal. On the other hand, the decision of Grove J. in *Perry v. Barnett* is now affirmed, 15 Q. B. D. 388; in other words, a dangerous but plausible attempt to extend the application of *Read v. Anderson*, 13 Q. B. D. 779, has finally failed.

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We are not aware that 'aliens not the subjects of any foreign State' have found a place in the classification of any publicist of repute. Most lawyers would say that the phrase involves a contradiction in terms. Yet such a status exists. It has been invented by the Christian and civilised government of Roumania for the purpose of continuing to persecute the Jews in evasion of the obligations undertaken by it under the Treaty of Berlin as part of the consideration for Roumania being recognised as an independent State. By this ingenious definition Roumanian Jews are excluded from the benefits alike of citizenship and of comity. The particulars of this gross and scandalous violation of good faith and the public law of Europe are given in Mr. D. F. Schloss's pamphlet, 'The Persecution of the Jews in Roumania,' published by Mr. Nutt and sold at a nominal price.

The Law Reports for July, August, and September contain (if we exclude cases determined by the House of Lords and the Privy Council) 120 cases. Of this number 77 are decisions of the Court of Appeal. The Reports therefore are now in effect filled with judgments given by the Court of Appeal interspersed with the comparatively unimportant decisions arrived at by Courts of first instance. These are facts to which the attention of the Council of Law Reporting should be directed; they forcibly suggest the conclusion that the decisions of the Court of Appeal should be published in separate volumes. Our judicial system is changing, our scheme of reporting should change with it.

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The proceedings of the Conference on Commercial Law being held at Antwerp as our present Number goes to press, and the publications issued in connexion therewith, will be noticed in our January number.

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(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

*The Journal of Jurisprudence and Scottish Law Magazine.* Vol. xxix, Nos. 343 and 344, for July and August, 1885. Edinburgh: T. & T. Clark.

No. 343. Technical Objections and Escapes from Justice, no. iii.—The Transmission of Trust and Executory Funds—The Lunacy Laws—School Board Elections—Reviews, Notes, &c.

No. 344. Technical Objections and Escapes from Justice, no. iv.—Patents, Designs, and Trade-Marks Act, 1883—The Origin and History of the High Court of Justiciary, no. vii.—Notes of Cases, &c.

*Canada Law Journal.* Vol. xxi. 1885. Toronto: C. Blackett Robinson.

No. 11, June 1. Treason-felony in the North-West—Recent English Decisions—Notes of Canadian Cases, &c.

No. 12, June 15. Taxing-officers and Counsel Fees—Administration of Real Assets—Choses in Action—International Responsibility for Dynamite Warfare—Reports, Book Review, Notes, &c.

No. 13, July 1. Criminal Jurisdiction in the North-West Territory—Jurisdiction of Ontario Courts in Manitoba and the North-West—Notes of Cases, English and Canadian—Law Society (official résumé of proceedings)—Notes, &c.

*The Canadian Law Times.* Vol. v, Nos. 6 and 7, June and July, 1885. Toronto: Carswell & Co.

No. 6. Ontario Legislation, 1885—Legislative Interference with Contract—What constitutes Registration—Reviews, Notes of Cases, &c.

No. 7. Creditors' Remedies against Companies apart from the provisions of the Winding-up Acts—Reviews, Notes of Cases, &c.

*The Cape Law Journal.* Vol. 2, Part 3, June 1, 1885. Grahamstown: for the Incorporated Law Society of the Cape of Good Hope, Richards, Slater, & Co.

Trial by Jury—The Liabilities of Registered Accredited Agents—Proposed Penal Code for the Transkeian Territories<sup>1</sup>—The late Earl Cairns—Book Review—Digest of Cases, Notes, &c.

*The American Law Record.* Vol. xiv, No. 1, July, 1885. Cincinnati: Bloch Publishing Company.

Reports in Supreme Court, U. S., Pennsylvania, Michigan, Ohio, and Wisconsin—Current Items—Digest.

*Revue de Droit International et de Législation Comparée.* Vol. xvii. 1885. Brussels and Leipzig.

No. 3. The Vienna Congress and the Berlin Conference (Sir Travers Twiss)—The Colonial Policy of Italy (E. L. Catellani)—The English Draft

<sup>1</sup> [The writer of this article commits the mistake of attributing the Indian Penal Code to Mr. Justice Stephen: we thought Macaulay's relation to it was better known.—ED.]

Penal Code of 1879, no. 1 (O. Q. van Swinderen)—International Law of the Roman Republic (G. Fusinato)—Book Reviews and Notices.

No. 4. The Law of Nature and Private International Law (Brocher de la Fléchère)—International Law as to Railways in War-time (L. de Stein)—Points of International Law in the Anglo-Russian Dispute (F. H. Geffcken)—The Oxford Resolutions on Extradition (A. Rolin)—Reviews.

*Bulletin de la Société de Législation Comparée.* 16<sup>me</sup> Année. No. 6, June, 1885; No. 7, July, 1885. Paris.

Étude sur le colonage partiaire particulièrement en Dalmatie (Pappafava, Fr. transl. by Arnaud)—Reports and Reviews.

*Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart.* Vol. xii, Part 4. Vienna: Alfred Hölder, 1885.

Bemerkungen zur 'Nordbahnfrage' (zur Lehre vom Privileg, Staatsrechtlichen Vertrag und von der Enteignung) (Randa)—A question on the law of Pledge under the Austrian Civil Code (Schrutka-Rechtenstamm)—Zur Lehre von der Gesamtsache (Ernst Tiel)—Book Reviews.

*Archivio Giuridico.* Vol. xxxiv, Nos. 5 and 6 (completing the volume). Pisa, 1885.

The proposal to introduce the Swiss *Referendum* in Italian local government (concluding against it, with or without modification), (Crivellari)—History of Divorce in Roman Law (Piccinelli)—Can the analogy of general average be applied to damage by fire on land? (as between, e. g., occupiers of different floors in the same building), (Padula)—An apparent inconsistency in the Italian Civil Code (Polacco)—Critical note on Festus (Ferrini)—Aryan Comparative Law (Cogliolo)—The Customal of Visco, ed. Santoni (Cogliolo)—Roman Law in Current Cases—Legal Science in Germany—Book Reviews.

*Il Filangieri: Rivista Giuridica Italiana di Scienza, Legislazione e Giurisprudenza.* Naples.

Vol. 10, Part 2, No. 5, May, 1885. A special number devoted to reports of cases in Courts of Cassation and other Courts in the kingdom of Italy.

Vol. 10, Part 1, No. 7, July. Assignment of Debts free of Equities (Spinelli)—Proposals for a Law of Extradition (Masucci)—Della rinunzia da parte del venditore dell' ipoteca legale e della relativa iscrizione (Lomonaco)—The application of Commercial Law to the sale of Immovable Property (Marghieri)—Reviews, &c.

*Rassegna di Diritto Commerciale Italiano e Straniero.* Turin.

Vol. 2, Part 9. Recent German changes in Company Law compared with the Italian Code, concluded (Vitalevi)—Reviews—Reports of Cases. Signor Salvatore Sacerdote's translation of the Bankruptcy Act 1883 is now reprinted from the *Rassegna* with a preliminary essay which compares our Act with the provisions of other codes (La legge inglese sul fallimento, volgarizzata dall' avv. Salvatore Sacerdote, &c. Torino, 1885. 8vo. pp. 32 and lxxii).

Vol. 2, Part 10. The Contract of Life Assurance (Vincenzo Prodi)—Insurance against Flood (I. Pithon)—Reviews, Notes of Exchanges, Reports, &c.

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The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.





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